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In this Term, the practice of sitting in Banc in the Bail Court, on the days of the Nisi Prius Sittings in Middlesex, was discontinued.

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CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Hilary Term.

IN THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who sat in the Bail Court in this Term was,

ERLE, J.

Bail Court.
1852.

COMMERELL *v.* BEAUCLERK.

November 25, 1851.
January 12, 1852.

Coram *Erle, J.*

THIS was a rule calling on the defendant to shew cause why a rule for judgment of reversal of outlawry should not be rescinded, and the judgment, if any, set aside; and why it should not be made a condition of reversing such outlawry that the defendant should put in and perfect special bail.

Where a writ of error is brought by attorney to reverse an outlawry on mesne process for error in fact, the Court has power, under the 4 & 5 Wm. & M. c. 18, s. 3, to require the plaintiff in error to put in special bail.

The defendant in an action, in which an affidavit to hold to bail might have been made under the 1 & 2 Vict. c. 110, s. 3, having been outlawed, brought a writ of error by attorney, assigning for error his residence abroad at the time of the exigent awarded; and upon a verdict in his favour, obtained the usual rule for judgment of reversal. The Court set aside the rule as irregular, on the ground that special bail ought to have been put in.

A rule for judgment of reversal of outlawry upon a verdict finding error in fact, was obtained on the 28th of May. Application to set it aside on the ground of irregularity, on the 10th of June: *Held*, not too late.

Volume I. 1852.

COMMERELL v. BEAUCLERK.

The following facts appeared upon the affidavits. The defendant was indebted to the plaintiff in a sum of 204*l.*, for money paid, &c. The plaintiff brought an action of assumpsit for it, and proceeded to outlawry. The defendant who had left the country eight months before the writ of summons was issued, and had since been and still was residing abroad, sued out a writ of error by attorney, to reverse the outlawry, assigning for error his residence beyond the seas at the time of the exigent awarded. Issue having been joined on that assignment of error, and a verdict having been found on the 28th of last May, in the defendant's favour, he, on the 6th of June obtained a rule, as of course, for judgment of reversal of the outlawry, on production in Court of the nisi prius record and postea. The present rule was obtained on the 10th of June, and served on the 16th.

Bovill shewed cause. There is no authority for imposing terms upon a defendant who brings a writ of error to reverse an outlawry. The distinction between a writ of error and a motion for reversal of the outlawry is well understood. In the latter case, the application is to the discretion of the Court, who may impose terms in granting it; in the former, the Court is bound to give effect to the writ of error, to which the subject is entitled ex debito justitiæ. In 2 *Chit. Archb. Pract.*, 1148, 8th ed., after mentioning the conditions on which an outlawry will be reversed on motion, it is said: "There may be cases, however, in which reversing an outlawry by writ of error may be advisable; and it is to be borne in mind, that, on a reversal by such writ, the Court cannot, as in the case of a motion for the reversal, impose on the party any terms (*a*)." Even upon motion, the Court has, where the defendant was beyond the seas at the time of the exigent awarded, reversed the outlawry without imposing further terms upon the defendant than

(*a*) The authorities cited by the learned editor for this position do not, however, support it.

the entry of a common appearance and the payment of costs; *Harvey* v. *O'Meara* (*a*). From the judgment of *Coleridge*, J., in that case, it is clear that he thought that a defendant was entitled ex debito justitiæ to judgment of reversal upon a writ of error, and that the Court had no power to impose any terms upon him. His Lordship, after observing that the case before him was not within the Statute of Elizabeth, and, therefore, that it was not compulsory on the Court to require bail, adds: "The fair result of the cases appears to be, that although the reversal is a matter of right, still, where the party applies for it on motion, the Court may exercise its discretion as to the terms it will impose on him." So in *The Bank of England* v. *Reid* (*b*), where the Court, upon motion, imposed upon the defendant the condition of putting in special bail, *Parke*, B. appears to have entertained the same opinion. "There is no doubt whatever," says his Lordship, "that it is the constant practice of the Court, on motion to set aside an outlawry, to impose such terms as they think reasonable, this being an application to the equitable jurisdiction of the Court. If the defendant chooses to resort to a writ of error, he is at liberty to do so; but if he applies to the Court, the invariable practice is to impose on him the terms of paying costs," &c.

But even if the Court, according to the case of *Serocold* v. *Hampsey* (*c*), has the power, the present is not a proper case for exercising it. First, because the 1 & 2 Vict. c. 110, has abolished the right to arrest on mesne process, except where the party is about to go abroad. In *Porter* v. *O'Meara* (*d*), the Court reversed an outlawry since that statute, even upon motion, without calling on the defendant to put in bail to the action. In *Harvey* v. *O'Meara* (*a*), *Coleridge*, J., says: "Before the statute, if the action was on

(*a*) 7 Dowl. 725, 737.

(*b*) 7 M. & W. 159, 163; S. C. 8 Dowl. 848.

(*c*) 12 East, 624, n. (*b*); S. C. 1 Wils. 3; 2 Stra. 1178; 2 Salk. 496.

(*d*) 5 Bing. N. C. 626; S. C. 7 Scott, 837; 7 Dowl. 657.

bailable process, or although on serviceable, yet if affidavits were made of a debt on which the party might be held to bail, the defendant, on reversing the outlawry, would have been at least held to special bail in the alternative; if the original process was only serviceable, and the cause of action precluded any other, he would have been, generally speaking, held to common bail only. This practice followed the rule laid down for the sheriff by the 4 & 5 Wm. & M. c. 18, and also proceeded on the principle of placing the plaintiff in the same situation after the reversal as before. If, therefore, this action had been commenced after the passing of the recent statute, and the defendant had not been arrested by a Judge's order, there can be little doubt, that the correct course would have been to reverse the outlawry, on entering a common appearance only." In *The Bank of England* v. *Reid* (*a*), *Parke*, B. says: "Since the statute 1 & 2 Vict. c. 110, and the decision of my Brother *Coleridge* in *Harvey* v. *O'Meara*, the general rule of the Courts ought to be, to discharge a defendant from outlawry on entering a common appearance, and on payment of costs. If the plaintiff says that he has lost an opportunity of arresting the defendant, he should make that clearly appear by affidavit." In the present case the plaintiff cannot have lost an opportunity of arresting the defendant, as he was resident abroad at the commencement of the action.

Secondly, On account of the delay which has taken place in making this application. It was formerly thought that the judgment of reversal might be signed immediately after verdict; but in *Sexton* v. *Astrop* (*b*), it was held that the plaintiff must wait the usual time, as in other cases, in order that the defendant in error might have the opportunity of moving. The defendant should have moved within that time, or at all events, have come to the Court sooner than he has done.

(*a*) 7 M. & W. 159, 164; S. C. 8 Dowl. 848.
(*b*) 1 Dowl. 14, N. S.

Lush, in support of the rule. Prior to the stat. 4 & 5 Wm. & M., c. 18, a defendant seeking to reverse an outlawry was bound to appear in Court; and the reason assigned was, that the plaintiff might be enabled to arrest him as soon as the judgment of reversal was pronounced. That act, however, by sect. 3, enacts, "for the more easy and speedy reversing of outlawries in the said Court," that "no person or persons whatsoever who are or shall be outlawed in the said Court for any cause," &c., "shall be compelled to come in person into, or appear in person in, the said Court to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail, in all cases, except where special bail shall be ordered by the said Court." At the time of passing that statute there was no legislative provision fixing the amount at which a defendant might be held to bail; and that act leaves the amount, as at common law, entirely in the discretion of the Court. Since that statute, an outlaw who brings a writ of error by attorney is not entitled to reverse the judgment as a matter of right; *Serocold* v. *Hampsey* (*a*). *Lee*, C. J., there says, "By stat. 31 Eliz. c. 3, bail is to be given to a new action, and to satisfy the condemnation money where the reversal is for want of proclamation; but here the assignment of error is that the defendant was beyond the seas at the time, and not for want of proclamation. There is no case cited where bail may not be taken on reversal of an outlawry for other cause than that in the stat. 31 Eliz." And accordingly, the Court ordered the plaintiff in error to find bail in the alternative, either "to pay the condemnation money, or render the body." In *Havelock* v. *Geddes* (*b*), the reversal was by writ of error brought by the defendant in person, on the ground of his being beyond the seas at the time of the outlawry; and yet the Court gave judgment of reversal only on the terms of bail being given to render the

(*a*) 12 East, 624, n. (*b*); S. C. 1 Wils. 3; 2 Stra. 1178; 2 Salk. 496.
(*b*) 12 East, 622.

principal or to pay the condemnation money. [*Erle*, J.—The counsel for the plaintiff in error in that case do not appear to have objected to give bail, but only to have insisted that it should not be conditioned absolutely to pay the condemnation money.] In the case of *Serocold* v. *Hompsey* (*a*), as reported by *Strange* (*b*), the Court is said to have "made no difficulty to reverse" the judgment of outlawry; but "the question was, upon what terms they should do it, the plaintiff insisting on special bail, and having now made a proper affidavit," (of the plaintiff's demand): "and the defendant insisting to file common bail only. The Court," continues the report, "upon considering the words of 4 & 5 Wm. & M. c. 18, s. 3, which empowers the outlaw to appear by attorney (as he did here) and says 'It shall be reversed without bail in all cases, but where special bail shall be ordered by the Court,' declared they were of opinion, they had a discretionary power to require it or not" (*c*).

The stat. 1 & 2 Vict. c. 110 applies only to cases where the arrest is a direct arrest by the plaintiff, and not where it is the consequence of some collateral proceeding, such as an arrest under a foreign attachment; *Day* v. *Paupierre* (*d*). It cannot be contended that that statute repeals the act of 4 & 5 Wm. & M. c. 18, so far as the latter empowers the Court to direct special bail to be given. It can "relate only to arrest of the defendant by the act of the plaintiff in suing out a writ for that express purpose" (*e*). This case is distinguishable from *Harvey* v. *O'Meara* (*f*), and *The Bank of England* v. *Reid* (*g*); as in both those cases the defendants were living in this country at the time of the reversal, while here the defendant is resident abroad; and unless the Court will compel him to give special bail, there is no mode of proceeding with the action.

(*a*) 12 East, 624, n. (*b*); S. C. 1 Wils. 3; 2 Stra. 1178; 2 Salk. 496.

(*b*) 2 Stra. 1178.

(*c*) 2 Stra. 1179.

(*d*) 7 D. & L. 12.

(*e*) Per Curiam, in *Day* v. *Paupierre*, 7 D. & L. 14.

(*f*) 7 Dowl. 725.

(*g*) 7 M. & W. 159; S. C. 8 Dowl. 848.

Lastly, the present application is sufficiently in time. Besides, the rule for judgment of reversal of outlawry should have been drawn up on the condition insisted upon; or have been a rule nisi only in the first instance, and not a rule absolute.

Cur. adv. vult.

ERLE, J., in the present Term (January 12th), delivered judgment.—

In this case the defendant, being outlawed, appeared by attorney and brought a writ of error to reverse the outlawry, on the ground that he was abroad at the time of the exigent; and after verdict finding that fact, he obtained a rule, as of course, for judgment of reversal. The plaintiff below obtained a rule nisi for setting aside that rule, on the ground that the defendant was bound to put in special bail on obtaining judgment, he having appeared by attorney, and the action having been brought for a debt exceeding 20*l.*, and process of outlawry having been properly resorted to for the purpose of compelling appearance: and I am of opinion that the rule should be made absolute.

The defendant appeared by attorney, under the 4 & 5 Wm. & M. c. 18, s. 3, which authorizes appearance by attorney to reverse outlawry without bail, in all cases, except where special bail is required by the Court; and as special bail was required by the Court at the time of that statute, in such a case as the present, I think it ought to be required now from a defendant who comes in under its provisions.

In *Serocold* v. *Hampsey* (*a*), a case similar to the present, it was decided that the proper course for reversal was by rule to shew cause why judgment of outlawry should not be reversed on putting in special bail. And *Denison*, J., states that the practice of reversal before the statute of Wm. & M. was by putting in special bail, and points out

(*a*) 12 East, 624, *in notis*.

that the right to special bail from an outlaw is distinct from the right to arrest on mesne process, and is not affected by the statute requiring an affidavit to hold to bail.

In *Havelock* v. *Geddes* (*a*), it was assumed by the counsel on both sides, and assented to by the Court, that an outlaw ought, on reversal, to put in special bail, if the action was for a debt of a given amount; and many authorities are collected shewing that to have been the course of law. The point to be decided was, whether the recognizance should be absolute to pay, or, in the alternative, to pay or render; and Lord *Ellenborough's* observation in his judgment, that no terms can properly be imposed when judgment of reversal is pronounced, as at common law, must be construed with reference to that point. The judgment decides that the term of an absolute recognizance to pay cannot be imposed, unless the outlaw comes in under some statute authorizing that term to be imposed. The judgment leaves the right to a recognizance in the alternative, as it stood before at common law.

It is not necessary for me, in coming to this judgment, to consider whether the decision in *Harvey* v. *O'Meara* (*b*),—that an outlaw, since the statute for the abolition of arrest on mesne process, has a right to reverse the judgment on entering a common appearance,—conflicts with these authorities and with the judgment of Lord *Abinger* in *The Bank of England* v. *Reid* (*c*), and with the principle, that more security should be required from a debtor who has stood out to outlawry, than from a debtor who appears at first: because in *Harvey* v. *O'Meara* the outlaw appeared in person, being in custody on the capias utlagatum, and was not shewn to be going abroad, so as to be subject to an order for a capias; while here the outlaw appears by attorney, and is still abroad, and would be liable to arrest if he were in England with intent to return abroad. So that

(*a*) 12 East, 622, 31.
(*b*) 7 Dowl. 725.
(*c*) 7 M. & W. 159, 163.

unless special bail be required, process of outlawry will be nugatory, if the defendant has no property within the jurisdiction of the Court liable to be taken in execution.

Upon these grounds, I think that the rule for judgment of reversal without putting in special bail was irregular; and as the plaintiff moved without delay for a rule to set it aside, he is entitled to make his rule absolute.

Rule absolute.

January 21.

In re an Arbitration
Between EDWARD BYRNE DAVIS, DONALD M'RAE,
and
GEORGE POTTER.

Coram *Erle, J.*

Before a rule for payment of money in pursuance of an award can be drawn up, the award must be filed or deposited in the Rule Office.

Where an award is deposited by way of security in the hands of a third party, the officers in the Rule Office, on drawing up a rule nisi for payment of money under the award, the rule is disposed of.

IN this case a rule had been obtained, calling on George Potter to shew cause why he should not pay two several sums of 5482*l.* 2*s.* 9*d.*, and 257*l.* 12*s.* 1*d.*, pursuant to an award.

It appeared that Davis, to whom the money was payable, had taken up the award, but had subsequently deposited it by way of security with a creditor, who, although willing to further the drawing up of the rule, refused to part with the possession of the award. The officers at the Rule Office having declined to draw up the rule unless the award was either filed or deposited in the office, or to draw it up upon the filing of an attested copy in lieu thereof;

Prentice moved that they should be ordered to draw up

will receive it as a deposit from the holder, to be returned to him as soon as

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the rule, upon filing a copy of the award. The officer was wrong in insisting on the filing of the original award. *Sherry* v. *Oke* (*a*) shews that it is sufficient to file a copy of the award upon motion to set it aside. [*Erle*, J.—The rule asks for what is equivalent to an attachment. A rule to set aside an award may be granted upon reading a copy, because, in most cases, the party in whose favour the award is made is in possession of the original, and if the Court required its production, a party affected by an unjust award would often be without a remedy.] There seems to be no reason why filing a verified copy of the award should not be sufficient. [*Erle*, J.—It is not so much a matter of principle as of practice. The Master says, it is not absolutely required that the award should be filed: it is sufficient if it be deposited in the office until the rule is disposed of.] If the production of the original award is not considered necessary where the motion is to set the award aside, it ought not to be considered so where the motion is to enforce it.

ERLE, J.—The practice with respect to enforcing an award by attachment, has always been to require the filing or deposit of the original award; and I think that there is good reason for applying it to a rule for payment of money. Before the Court enforces an award by what amounts to a judgment, it requires the production of the original award, which is the highest evidence of its contents, and declines to take the chance of there being a defect, by mistake or otherwise, in the copy. I must say I think that there is good reason for such a practice.

The officer of the Court will receive the award, when deposited in his hands, as the property of the party producing it, to be returned to him as soon as this rule is disposed of. There is no risk worth mentioning in thus

(*a*) 3 Dowl. 349.

depositing it. If the party who now holds it brings it into Court for the purposes of this rule, the officer will notice that he is the party entitled to it, and will return it to him as soon as the rule is disposed of.

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Application refused (*a*).

(*a*) The rule was not drawn up.

The practice of the Queen's Bench Rule Office with regard to filing or depositing documents referred to in affidavits, is stated to be as follows.

It is optional with the party making the affidavit, to annex to it the document, or not. If he does annex it, the document is filed with the affidavit, and cannot afterwards be taken off the file, without a Judge's order to that effect.

If he does not, he refers to it in his affidavit as the document "marked (A.) and exhibited to this deponent at the time of swearing this affidavit." In the latter case, he must produce the document at the time of swearing the affidavit, and must deposit it in the Rule Office, there to remain until the rule, to obtain which the affidavits are filed, is disposed of. As soon as that occurs, the party is entitled to have the document delivered back to him, whether the rule is drawn up or not.

But if the opposite party, on shewing cause against the rule, has taken a copy of the document, it will only then be delivered back to the party depositing it, upon his leaving an office copy in its place.

REGINA *v.* The MAYOR and ASSESSORS of HARWICH.

January 30.

Coram *Erle, J.*

A RULE was obtained in last Michaelmas Term, calling upon the mayor and assessors of the borough of Harwich, in the county of Essex, to shew cause why a writ of man-

This Court will not grant a mandamus to the mayor of a borough to revise a list of persons claiming to have their names inserted on the burgess list, where the refusal to insert them proceeded on the ground that there existed no valid burgess list to revise.

If the claimant makes a valid claim, which is not entertained only because by the omission of the overseers no valid burgess list is made out, he is entitled to a mandamus to insert his name on the burgess roll, *semble*.

Whether a burgess list signed by two overseers only, and not by the churchwardens or a majority of the parish officers, is a valid list under the 5 & 6 Wm. 4, c. 76, s. 15, *quære?*

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damus should not issue directed to them, commanding them forthwith to hold a Court and revise the list made by the town clerk in last September, of persons claiming to have their names inserted on the burgess list of the borough.

The following facts appeared upon the affidavits. The borough of Harwich, which is included in Schedule (A) of the 5 & 6 Wm. 4, c. 76, consists of two parishes, Saint Nicholas, and Dovercourt, for each of which four overseers, including the churchwardens, are annually appointed. In September, 1851, lists of the persons entitled to be upon the burgess roll were prepared and delivered to the town clerk by the overseers of each parish. These lists were signed by two only of the overseers, but not by the churchwardens. Joseph Carter, an inhabitant householder, being entitled to be placed upon the burgess roll in respect of property in the parish of Dovercourt, and being misdescribed in the list for that parish, sent in a claim to the town clerk, who accordingly inserted his name in the list of claimants, which he prepared according to the statute. At the revision before the mayor and assessors, it was objected that the burgess lists were not signed by all the overseers, or by the major part of them. The mayor and assessors held the objection to be fatal, and refused to revise the lists. They were then required to revise the list of claimants; but this they also refused to do, and they dissolved the Court. It appeared that Carter's name was on the roll of burgesses of the preceding year as entitled to vote in respect of property in the parish of Dovercourt.

Shee, Serjt., and *Hawkins* shewed cause. First, the mayor and assessors acted rightly in treating the burgess lists as informally signed, and, therefore, in refusing to revise them. The 5 & 6 Wm. 4, c. 76, s. 15, enacts, that on the 5th of September in every year, "the overseers of the poor" "shall make out an alphabetical list" "of all persons who

shall be entitled to be enrolled in the burgess roll of that year;" "and the overseers shall sign such burgess lists, and shall deliver the same to the town clerk," who is to produce them for revision before the mayor, &c. By the interpretation clause, s. 142, "overseers" are to be construed to mean "all persons who execute the duties of overseers of the poor." By the 43 Eliz. c. 2, s. 1, "the churchwardens of every parish, and four, three, or two substantial householders there," "to be nominated yearly," "shall be called overseers of the poor," &c. In the case of *Reg.* v. *The Justices of Cambridgeshire* (*a*) it was held that where a notice is required to be signed by overseers of a parish, it must be signed by a majority of the aggregate body of churchwardens and overseers, and that if signed by two overseers only of a parish, which has also two churchwardens, it is bad. Secondly, even if the mayor and assessors were wrong in refusing to revise the lists, there is no authority for compelling them to revise the list of claimants. The 5 & 6 Wm. 4, c. 76, s. 18, only requires them to revise the burgess lists, to insert therein the names of those claimants who are entitled to be upon them, and to retain or expunge the names of those objected to. If this rule were made absolute and the mandamus obeyed, the effect would probably be that the list of claimants, when revised, would become the burgess roll; the present burgesses, who by 7 Wm. 4 & 1 Vict. c. 78, s. 6, are the persons on the burgess roll for the preceding year, would be disfranchised; and the present corporate office holders, none of whom are on the list of claimants, would become disqualified. The case of *Reg.* v. *The Mayor of Lichfield* (*b*), which is relied on in support of this rule, only decides that a person claiming to vote in respect of property in a parish for which no legal burgess list has been made, is entitled to have his name inserted on a

(*a*) 7 A. & E. 480; S. C. 1 P. & D. 249. See *King* v. *Burrell*, 12 A. & E. 460, affirmed in *King* v. *Share*, 3 Q. B. 31; S. C. 2 G. & D. 453.

(*b*) 1 Q. B. 453.

burgess roll consisting of burgess lists (properly signed) of other parishes in the same borough; and not that the mayor should make a list for the parish of the claimant. Besides, there the application was to insert the claimant's name upon an existing burgess roll. Here it is, in effect, to make a burgess roll. In *Reg.* v. *The Mayor of Dover* (*a*), the lists were, as here, signed by the two overseers only, and not by the churchwardens; but as the mayor had revised the lists, the Court held that he could not avail himself of this objection on return to a mandamus to insert the name of a claimant upon the burgess roll. The proper course would probably have been, under circumstances similar to the present, to apply for a mandamus to insert the applicant's name on the burgess roll for the past year; but in this instance such an application would have been met by the answer that the name was already upon the roll. A further objection to this rule is, that the present mayor and assessors have no authority to revise lists of a preceding year; and the Court will not direct a mandamus to them to do that which their duty does not require them to perform.

Edwin James and *Lush*, in support of the rule. All that is sought by this application is, that the mayor should be ordered to revise the list of claimants, valeat quantum. It is not necessary now to decide whether there is any burgess roll on which he can place the claimant's name. That will be a question to be decided hereafter when the list shall have been revised, and he will then have an opportunity of contending that no such roll exists. The burgess roll is composed of the burgess lists revised. It is the mayor's duty to revise such of those lists as are legally framed. If there had been six parishes in this borough, and five of the lists had been perfect, and one imperfect, he would have been bound to revise the five perfect ones. [*Erle*, J.—Suppose a town to

(*a*) 11 Q. B. 260.

have nearly fifty parishes, as Norwich has, and the lists for all but one to be imperfect, can it be contended that the mayor can, by revising that one, make it the burgess roll, and disfranchise all the rest?] He would be bound to revise the perfect list, whatever might be the effect of his so doing. In *Reg.* v. *The Mayor of Lichfield* (*a*), no burgess list was made out for the district in which the claimant resided; but the Court held that the neglect of the overseers to prepare a proper list did not deprive the claimant of his right, and they granted a mandamus to enter his name on the burgess roll which was made up from the other lists. Lord *Denman*, in giving judgment, says, "In my opinion that clause (*b*) ought to receive a liberal construction; and, if we see that the party has a right, we ought not now to take from him the benefit of it by reason of some defect arising from the fault of the overseers." And Mr. Justice *Patteson* says, "What the mayor is entitled to do in such a case may be a question. If the overseers sent in a paper, saying that in such a parish there were no persons entitled, I think it cannot be denied that the mayor might insert names, if the parties claimed, and proved themselves entitled: and I also think it far from impossible that, without such a proceeding by the overseers, if he found that there were many persons entitled, whose names were not sent in, he might make a list." In *Reg.* v. *The Mayor of Dover*, the Court said, that without deciding whether a list signed by the two overseers only was sufficient, it was clear that even if it was necessary for the churchwardens to sign, their omission to do so could not be an answer to an application to insert a claimant's name upon the roll.

ERLE, J.—I am of opinion that this rule should be discharged. This case certainly borders somewhat upon those cited. I desire, however, to be understood as offering no

(*a*) 1 Q. B. 453, 462. (*b*) 7 Wm. 4 & 1 Vict. c. 78, s. 24.

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opinion concerning them, but as confining myself entirely to the facts of the case now before me. The applicant appears to have put in a claim to be admitted on the burgess list, and to have been entered on the list of claimants, which is admitted to be regular and valid; but in consequence of the former list being, as it is alleged, informally signed, the mayor refused to entertain his claim. He now calls upon me to order the mayor to revise the list of claimants, which he contends to be a substantive list and capable of becoming the burgess list.

It must be taken to be conceded, for the purpose of this argument, that for this borough and for this year there was a null burgess list. It seems to me that to say that the mayor is bound to revise the list of claimants, is a mistake. A list of claimants presupposes a valid burgess list, and it is the latter list which the mayor is to revise by striking out those who may have been improperly inserted, and by adding, from the former list, those who may have been improperly omitted.

The list of claimants is to be considered not as a substantive list by itself, but as an adjunctive list, from which are to be taken the names of those who are improperly omitted from the burgess list, to constitute with the latter list, the burgess roll. It is a list of persons claiming, not to be burgesses of the borough, but to have their names inserted upon the burgess list. The application, therefore, to have this list revised as a substantive and independent list, is wholly unfounded; and the rule must accordingly be discharged.

I have no hesitation in coming to this decision, for if I were to accede to this application and to command the mayor to revise this list, it might possibly then become the burgess roll for the borough, and all the burgesses who are now on the roll might be disfranchised. It would be manifest injustice, and a departure from the clear intention of the act of Parliament, if the claimants were to become the only burgesses, and all the present burgesses be disfranchised,

by reason of the parish officers having made a slip in omitting to sign the burgess lists.

It seems to me that *Reg.* v. *The Mayor of Dover* (*a*), decides that if the mayor had chosen to take the burgess list as properly signed by the two overseers, and had revised it, he could not now set up its insufficiency; but it is not necessary to give any opinion on that point, as the sole question before me is, whether he is bound to revise the list of claimants.

If there was no burgess list, and the applicant had done all that he could to make a valid claim, I should be inclined to hold in accordance with the opinion of my Brother *Patteson*, in *Reg.* v. *The Mayor of Lichfield* (*b*), that he was entitled to have his name put upon the burgess roll. That, however, is not the present application.

Rule discharged.

(*a*) 11 Q. B. 260. (*b*) 1 Q. B. 453.

REGINA *v.* THE INHABITANTS OF THE TOWNSHIP OF TRYDDYN. *January* 29, 30.

Coram *Erle, J.*

PASHLEY moved, on the part of the defendants, for leave, in case they should demur to the indictment and the demurrer be decided against them, to plead over to the indictment.

Where an indictment against the inhabitants of a township for non-repair of a highway, alleged that the defendants ought to repair, but did not aver that they were bound by prescription or custom to do so; the Court, upon motion for the purpose, gave leave to the defendants, should they demur to the indictment, and the demurrer be decided against them, to plead over.

The indictment which had been removed by certiorari into this Court, was preferred at the Flintshire Quarter Sessions, and contained two counts. The first charged that there was a common and ancient highway leading from, &c.; that a certain part of it, being in the township of Tryddyn, was out of repair; "and that the inhabitants of

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the said township of Tryddyn," &c., "the common highway aforesaid, being in decay, from the time whereof the memory of man is not to the contrary, ought to repair and still ought to repair and amend, when and so often as it shall be necessary, &c."

Pashley. The object of the present motion is to save expense and delay to the parties. At common law the parish is bound to repair the highways within it. A township or district can only be liable by prescription or custom; and the prescription or custom should be alleged in the indictment. The present indictment merely states that the township "ought to repair," without averring either that they have been used and accustomed to repair all the highways within their township, and that this is one of them; or that they have been used and accustomed to repair this particular highway; *Rex* v. *Ecclesfield* (*a*). [*Erle*, J.—Suppose the road has never wanted repair.] That fact should then be alleged in the indictment. [*Erle*, J.—Should you not move to quash the indictment if it be bad?] The more regular course is to demur. The Court might, as it did in *Reg.* v. *The Birmingham and Gloucester Railway Company* (*b*), refuse to quash on motion, and direct the defendant to demur, with liberty to plead over. This it is now sought to do, without going through the form of a motion to quash. [*Erle*, J.—The practical point is, whether the indictment is bad after verdict. Is not the averment that from time immemorial the township ought to repair sufficient?] In a note to *Rex* v. *Stoughton*, 2 *Wms. Saund.* 158 *h*, 6th ed. (*c*), the contrary is stated to be law.

(*a*) 1 B. & A. 348.

(*b*) 3 Q. B. 223; S. C. 2 G. & D. 236.

(*c*) It is there said, "And agreeable to the distinction taken in *Keilway* between an obligation to repair by reason of tenure, and of inhabitancy, it has been holden, that an indictment against a *particular part* only of a parish, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that *the inhabitants* of the district from time immemorial *ought to repair and amend it*, is

The defendants are only anxious to take the proper course for raising the point without being at the expense of a trial of an issue in fact, which may afterwards become useless, if the indictment be bad after verdict. [*Erle*, J.—I think the proper course is to demur; and it seems reasonable that if the demurrer is decided against you, you should have liberty to plead over; but how can I order the Court to give you that liberty?] A similar rule was made in *Reg.* v. *The Birmingham and Gloucester Railway Company*, although the application there was to quash the indictment; but it cannot be necessary, for this purpose, that the defendants should first make a similar motion. [*Erle*, J.—I will consult the other Judges.]

Cur. adv. vult.

ERLE, J.—The defendants in this case may have the same leave as was granted in *Reg.* v. *The Birmingham and Gloucester Railway Company.*

Rule accordingly.

erroneous; it ought to have stated that the inhabitants of such district from time whereof, &c., *have used and been accustomed*, and of right ought, to repair and amend it. For the inhabitants of a particular division of a parish are not bound to repair by common law, but their obligation must arise from custom, or prescription; and therefore the indictment ought to shew the custom, prescription, or reason of their obligation;" and several cases are cited.

See *Reg.* v. *The Inhabitants of the Isle of Ely*, 15 Q. B. 827.

January 30. Ex parte The CHURCHWARDENS and OVERSEERS, &c., of the PARISH of KELLYMAENLLWYD, CARMARTHENSHIRE.

Coram *Erle, J.*

After a notice of abandonment of an order of removal under the 11 & 12 Vict. c. 31, s. 8, the sessions have no jurisdiction to proceed with the appeal, even where the notice is given after the appeal has been adjourned for the purpose of amending the grounds of appeal.

The sessions having, upon objection taken to the grounds of appeal against an order of removal, adjourned the appeal to the next sessions for the purpose of having the grounds of appeal amended, the respondents, before those sessions, gave notice of the abandonment of the order; but the sessions, notwithstanding the respondents' protest, proceeded to hear the appeal, and quashed the order, with costs. The respondents attended the taxation of the costs. *Held*, upon motion to remove the order of sessions into this Court for the purpose of enforcing it,

1. That the sessions had acted without jurisdiction.
2. That the respondents had not waived the objection by attending the taxation.

THIS was a rule, under the 12 & 13 Vict. c. 45, s. 18, to remove into this Court, for the purpose of being enforced, an order of quarter sessions for the payment of the costs of an appeal.

The following facts appeared upon the affidavits. At the Easter Quarter Sessions, 1850, held at Haverfordwest, for the county of Pembroke, an appeal was entered and respited against an order of removal of Sarah Davis, widow, and her children, from the parish of St. Michael, Pembroke, to the parish of Kellymaenllwyd, Carmarthenshire. At the following July sessions, the appeal was called on for hearing; but upon the respondents taking an objection to the grounds of appeal, the Court ordered them to be amended (*a*), and the appeal to be adjourned to the next sessions. On the 10th of October, notice in writing of the abandonment of the order of removal was sent to the officers of the appellant parish. At the sessions, on the 15th, the appellants produced the notice of abandonment which they filed, and asked the Court to quash the order of removal, with costs. The respondents objected that the sessions had no power to hear or deal with the appeal, contending that according to the 11 & 12 Vict. c. 31, s. 8, the order appealed against became, after

(*a*) Under 11 & 12 Vict. c. 31, s. 4.

notice of abandonment, to all intents null and void. The sessions, however, proceeded with the appeal, and made the following order:

"It is ordered that this appeal, adjourned from the last quarter sessions, be now proceeded upon;" "that upon the production of the abandonment now filed, the order of removal be quashed, with costs to be taxed by the clerk of the peace, which costs are accordingly taxed at the sum of 29*l.* 11*s.* 4*d.*;" and "that the churchwardens and overseers of the poor of the parish of St. Michael, Pembroke, pay unto the churchwardens and overseers of the poor of the parish of Kellymaenllwyd, upon sight and service of this order, the sum of 29*l.* 11*s.* 4*d.*, being the amount incurred in the above appeal."

In the month of December, the costs were taxed by the clerk of the peace at 29*l.* 11*s.* 4*d.*; the attorney for the respondents attending the taxation, and consenting to the allowance of an item of two guineas for counsel's fee, which, according to the practice of the sessions, is not allowed except by consent.

A service, demand and refusal, were sworn to.

Rose shewed cause. First, the sessions had no jurisdiction to make the order in question. Secondly, even if they had, the costs have not been properly taxed, as they were not taxed during the sessions (*a*). And thirdly, the order is bad on the face of it, for not ordering that the costs should be paid to the clerk of the peace, pursuant to 11 & 12 Vict. c. 43, s. 27 (*b*).

As to the first point, as soon as the notice of abandonment was given, the sessions ceased to have any jurisdiction over the order of removal; and the appellants should have

(*a*) See *Reg.* v. *Long*, 1 Q. B. 740; S. C. 1 G. & D. 367. *Sellwood* v. *Mount*, 1 Q. B. 726; S. C. 1 G. & D. 358; *Reg.* v. *The Justices of Westmoreland*, 1 D. & L. 178; and *Reg.* v. *Mortlock*, 7 Q. B. 459.

(*b*) See *Reg.* v. *Hellier*, Q. B. Trin. Term, 1851.

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thereupon required the clerk of the peace to tax their costs. The 11 & 12 Vict. c. 31, s. 8 (*a*), enacts, that where an order of removal has been made, it shall be lawful for the overseers, &c. of the parish obtaining the order, "whether

(*a*) "That in any case in which an order shall have been made for the removal of any poor person, and a copy or counterpart thereof sent as by law required, it shall and may be lawful for the overseers or guardians of the parish who shall have obtained such order of removal, whether any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not, to abandon such order by notice in writing under the hands of such overseers or guardians, or any three or more of such guardians, to be sent by post or delivered to the overseers or guardians as aforesaid of the parish to which such person is by the said order directed to be removed; and thereupon the said order, and all proceedings consequent thereon, shall become and be null and void, to all intents and purposes as if the same had not been made, and shall not be in any way given in evidence in case any other order of removal of the same person shall be obtained: provided always, that in all cases of such abandonment the overseers or guardians of the parish so abandoning shall pay to the overseers or guardians of the parish to which such person is by the said order directed to be removed the costs which the said last-mentioned overseers or guardians shall have incurred by reason of such order, and of all subsequent proceedings thereon, which costs the proper officer of the Court before whom any such appeal (if it had not been abandoned) might have been brought shall and he is hereby required, upon application, to tax and ascertain at any time, whether the Court shall be sitting or not, upon production to him of such notice of abandonment, and upon proof to him that such reasonable notice of taxation, together with a copy of the bill of costs, has been given to the overseers or guardians abandoning such order as the distance between the parishes shall in his judgment require, and thereupon the sum allowed for costs, including the usual costs of taxation, which such officer is hereby empowered to charge and receive, shall be indorsed upon the said notice of abandonment, and the said notice so indorsed shall be filed among the records of the said Court; and if the said costs so allowed be not paid within ten days after such costs shall have been lawfully demanded the amount thereof may be recovered from such last-mentioned overseers or guardians in the same manner as any penalties or forfeitures are recoverable under the said act passed in the session of Parliament holden in the fourth and fifth years of the reign of King William the Fourth."

any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not, to abandon such order by notice in writing under the hands of such overseers or guardians," &c.; "and thereupon the said order, and all proceedings consequent thereon, shall become and be null and void to all intents and purposes as if the same had not been made, and shall not be in any way given in evidence in case any other order of removal of the same person shall be obtained." The object of the Legislature was to prevent parties from being concluded on a subsequent occasion by the abandonment of an order. But this object would be defeated if the sessions might, notwithstanding a notice of abandonment, quash the order. Had the notice of abandonment been given before the July sessions, it could not have been contended that the sessions had power to quash the order: but it will be urged that what took place at that sessions amounted to a part trial, and that therefore the above section of the statute does not apply. It is submitted, however, that the adjournment for the purpose of amending the grounds of appeal is in the nature of an entry and respite only. Section 4, under which the adjournment took place, recites that "a statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, *to prepare for trial;*" and enacts, that "no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed," "unless the Court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and *to prepare for trial.*" It then provides, "that in all cases where the Court shall be of opinion that any such objection to such statement" "ought to prevail," the Court may cause such statement "to be forthwith amended by some officer of the Court or otherwise, on

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such terms as to payment of costs to the other party, or *postponing the trial* to another day in the same sessions or to the next subsequent sessions," &c., "as to such Court shall appear just and reasonable." Here the Court did postpone the trial to the subsequent sessions, and, therefore, there was no part trial of the appeal. Besides, a special mode of obtaining the costs is pointed out by the 8th section, which must be followed. [He was here stopped by the Court, who called upon]

Pashley, to support the rule. As to the first point, the object of the Legislature was merely to remedy the inconvenience that arose where after an order of removal made, and before a respite of appeal, the parish obtaining the order was willing to abandon it; but they never intended to interfere with the jurisdiction of the sessions after an appeal had been respited. Nor will the inconvenience suggested on the other side arise from this construction, as it will be open to the respondents to shew, upon an appeal from a fresh order, that the present order was not quashed upon the merits. [*Erle*, J.—Useless costs may be incurred; and, besides, unless the sessions use extraordinary precision in drawing up their order, it may be open to contention that the order was quashed on the merits.] A sufficient object and a sufficient effect are given to the language of the section, without adding after the words "whether any appeal shall have been entered or not," the words "or respited or not." The construction contended for may oust the jurisdiction of the sessions in every case in which the appeal is respited. The sessions had the power to deal with the appeal at the July sessions, and they could not lose their jurisdiction over it by simply adjourning the further hearing till the subsequent sessions. If the parties proceed at the sessions to try the appeal, the respondents cannot afterwards oust the jurisdiction of the sessions by abandoning the order. Besides, in the present instance, the notice of abandonment was filed at the sessions,

and, therefore, the sessions might, under the 8th section, make an order for costs.

At any rate, the attendance at the taxation is a waiver of any objection to the order.

ERLE, J.—It is clear that the act intended to prevent the evil of such applications to the sessions after notice of abandonment, and I think that the words are quite wide enough to embrace the present case. From the time when the notice is conveyed to the opposite party, the litigation is at an end, except with respect to the costs; and they must be obtained in the mode pointed out by the proviso in the section. I think, therefore, that the sessions had no authority to make this order, and that if it were brought up, it would be found to be bad. I also think that the respondents could not, by attending the subsequent taxation of costs, confer a jurisdiction upon the sessions to make the order. The rule must be discharged.

Rule discharged.

GRAVATT *v.* ATTWOOD. *January* 27, 31.

Coram *Erle, J.*

Assumpsit for work and labour. Pleas, the general issue and payment. The verdict being for the plaintiff on the first, and for the defendant on the second issue: *Held*, that the Master rightly disallowed the costs of cross-examining upon interrogatories a witness whose examination in chief proved the first issue, and whose cross-examination was material only in reducing the damages on that issue, but did not affect the second issue.

Held also, that the Master properly disallowed the defendant such part of the expenses of witnesses as were incurred in qualifying them to give evidence; such as journeys and surveys to enable them to speak to the insufficiency of the work done.

EDWIN JAMES moved for a rule calling upon the plaintiff to shew cause why the Master should not review his taxation in the above cause.

This was an action of assumpsit to recover a sum of upwards of 14,000*l.*, for work, labour and materials, goods

sold and delivered, &c., by the plaintiff as an engineer, in and about surveying and preparing plans for a company called the Waterford, Wexford and Valentia Railway Company, of the provisional committee of which, the defendant was chairman. The defendant pleaded the general issue and payment. At the trial at the Croydon Summer Assizes, 1849, a verdict was taken for the plaintiff for the amount claimed in the declaration, subject to a reference, the costs of the cause to abide the event. On the part of the plaintiff the plans and surveys were produced before the arbitrator, and the evidence of a witness named Hayes, who had acted as sub-engineer, and had been examined on interrogatories, was relied upon to prove that the work had been done, and that the plans and surveys were correct. The defendant contended that the plans and surveys were incorrect, and that the company's bill had been lost in Parliament, in consequence of their insufficiency. To establish this defence, the defendant asked for, and obtained an adjournment of the hearing, to give him an opportunity of sending competent persons to Ireland to examine the plans and surveys on the spot. Two engineers were accordingly employed: they surveyed the line, and they proved that the work of the plaintiff was full of errors. It appeared that the plaintiff had been paid by the company, in the whole, a sum of 4253*l.* Upon this evidence the arbitrator directed that the verdict should be set aside, and that a verdict should be entered for the plaintiff on the first issue, and for the defendant on the second (*a*). On taxation of the costs, the Master refused to allow the defendant the expenses incurred in enabling the engineers to prove the insufficiency of the plaintiff's work, as being merely costs incurred in qualifying a witness to give evidence; but he allowed the ordinary expenses of their attendance as witnesses before the arbitrator. He also disallowed the costs of the cross-examination of the

(*a*) See *Gravatt* v. *Attwood*, 1 L. M & P. 392.

witness Hayes, on the ground that it bore solely upon the first issue.

Edwin James. The rule on which the Master acted, in disallowing the expenses of the engineers, is not binding in every case. In the present instance, the defendant's case could only be proved by witnesses who had surveyed the country; for the charges were fair enough if the work were properly done; and a rule which prevents the recovery of the costs, necessarily incurred in proving that it was not properly done, would frequently work great injustice. [*Erle*, J.—The Master reports that the practice has always been not to allow, as costs, the expenses of qualifying a witness to give an opinion; and it must be acknowledged that there is good reason for it. Rules of practice which are salutary in nine hundred and ninety-nine cases, must be followed in the thousandth, although, in that case, a contrary rule might appear more reasonable. I will, however, consult the other Judges, to see whether any modification of this rule should be adopted.]

Another ground for reviewing the taxation is, that the Master has disallowed the defendant's expenses of cross-examining the plaintiff's witness Hayes. As the plaintiff's claim was for a much larger amount than was found to be due under the general issue, the cross-examination was material in reducing that amount, and the costs of it should, on that account, have been allowed.

Cur. adv. vult.

ERLE, J., in this Term (January 31st), delivered judgment.—

In this case the declaration was in assumpsit, with pleas of the general issue and payment, each pleaded to the whole declaration.

The award finds the first issue for the plaintiff, and the second for the defendant: so that the defendant is entitled to the costs of the cause; and the plaintiff, to the costs of the first issue.

Upon the taxation, the Master allowed the plaintiff the costs of the witness Hayes, whose testimony went to prove the first issue, and he disallowed the defendant the costs of cross-examining the witness upon his appearance on a commission to be examined. This taxation has been objected to, on the ground that the claim of the plaintiff was for a much larger amount than was found to be due under the general issue, and that the cross-examination of Hayes was material for reducing that amount. But I am of opinion that the Master was right in the course he took.

If the defendant had divided his pleading so as to admit the part of the demand found due, and to deny the residue, the issue would have been found for him instead of against him, and he would have had all the costs, and these among the rest. Or if the award had treated the general issue as divisible, and found part of the claim for the plaintiff, and the residue for the defendant, perhaps the Master might have been able to treat the issue as double, and applying part of the evidence to the one part, and part of the evidence to the residue, have considered Hayes as a mixed witness: but as no such course was taken, and as the general issue is found absolutely for the plaintiff, it seems to me to follow that the Master was bound to decide as he did.

A further claim was made by the defendant for the costs of journeys and surveys to enable witnesses to acquire such knowledge as would qualify them to give evidence. This claim falls correctly under the head of instruction to prepare a witness. It is a general rule of taxation that such instruction should not be allowed among the costs of litigation chargeable to the losing party. I have looked in vain to the order of reference, and to the award, for any ground for making the present case an exception to the general rule.

There will, therefore, be no rule.

Rule refused.

Ex parte WILLIAM CLEE and WILLIAM OSBORNE. *January* 31.

Coram *Erle, J.*

WORLLEDGE moved for a rule under the 11 & 12 Vict. c. 44, s. 5, calling upon two justices of the county of Cambridge and one H. Hurrell, to shew cause why the justices should not draw up a joint conviction of William Clee and William Osborne, in accordance with the information summons, hearing and adjudication, and return the same to the clerk of the peace for the county of Cambridge; and why they should not cancel two separate convictions of the same parties for the same offence (*a*).

The 11 & 12 Vict. c. 44, s. 5, applies only to cases where justices have refused to act; and not where they have acted, although erroneously.

Where, therefore, justices drew up two separate convictions of two defendants instead of one joint conviction, the Court refused to grant a rule under the statute calling upon them to draw up a joint conviction.

The following facts appeared upon the affidavits. An information was laid by Hurrell against the applicants for using a dog in pursuit of game on a Sunday, contrary to 1 & 2 Wm. 4, c. 32, s. 3. There was but one information and one summons against them both. They were placed at the bar together, the charge was preferred, the evidence given, and the adjudication made against them, jointly. Clee was sentenced to pay 5*l.* and costs, or be imprisoned for three months; and Osborne to pay 10*s.*, or be imprisoned for twenty-one days. The defendants paid the fines, and within three days after the trial, gave notice of their intention to appeal against the conviction, under sect. 44, and entered into the proper recognizances for that purpose. The justices afterwards drew up and returned to the clerk of the peace for the county a separate conviction against each defendant.

Worlledge. The information, hearing, and conviction

(*a*) *Worlledge* moved in the alternative for a certiorari; but as no notice of motion had been given to the justices, that part of the rule could not be granted.

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being joint, the justices acted erroneously in drawing up separate convictions against the defendants. By so doing, they deprive the defendants of their privilege of appeal, as the notice of appeal and recognizance given become of no avail; and it is too late to give a fresh notice. Sect. 44, conferring the right of appeal, requires that notice thereof shall be given within three days after the conviction. At the trial, the notice of appeal already given would appear to be against a different conviction from those returned. [He referred to *Rex* v. *Tweedale* (*a*), and *Crepps* v. *Durden* (*b*)].

ERLE, J.—Is the remedy which you seek the proper one?

Worlledge. A mandamus would lie; and if so, the Court will grant a rule under 11 & 12 Vict. c. 44, s. 5 (*c*). The

(*a*) 7 T. R. 153, n. (*c*).

(*b*) Cowp. 640.

(*c*) "'And whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him:' be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to shew cause why such act should not be done; and if after due service of such rule good cause shall not be shewn against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with such rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required as aforesaid."

object of that provision is, that the legality of any act to be done by justices may be considered and adjudged by a Court of competent jurisdiction, without the expense of a mandamus and return, and the justices be enabled to perform their duty without risk of any action or other proceeding being brought against them. Here the justices, if they altered the convictions, might be liable to criminal informations in case they had no right to do so.

EARLE, J.—I am clearly of opinion that the present application does not come within the provision of the section in question. That section applies to cases where the magistrates are unwilling to act, lest they should render themselves liable to an action of trespass; and it therefore enacts, that they may be ruled to shew cause why they should not do the act. The party interested is called upon to oppose the rule, and if it is made absolute, the magistrates are protected in obeying it. The section has no application to cases where the magistrates have not abstained from acting, but have done what they conceived to be their duty, although they may have taken what the applicant contends is a mistaken course. The rule, therefore, must be refused.

Rule refused.

LEWIS *v.* DYSON. *January* 31.

Coram *Erle, J.*

THIS was a rule calling upon the plaintiff to shew cause why James Markwell should not have leave to add to the entry of the judgment in this action in the book of the

Where a plaintiff, after registering his judgment to charge the defendant's real estate under the 1 & 2 Vict. c. 110, s. 19, took the defendant in execution upon a ca. sa., the Court ordered him to attend before the Master of the Common Pleas, and consent to an entry of that fact being made in the Master's book.

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senior Master of the Court of Common Pleas, a statement that after the judgment was entered, and before certain hereditaments of the defendant thereby charged had been converted into money or realised, the plaintiff took the person of the defendant in execution upon the judgment, and so forfeited the said charge; or why the entry of the judgment should not be struck out.

The following facts appeared upon the affidavits. The plaintiff obtained judgment in this action, and on the 28th of April, 1849, caused an entry of the judgment to be made in the book kept by the senior Master of the Court of Common Pleas, in pursuance of 1 & 2 Vict. c. 110, s. 19, for the purpose of charging certain freehold estates of the defendant in the county of York. On the 1st of June in the same year, he took the defendant upon a ca. sa. issued upon the judgment. On the 1st of December, an order was made by the Insolvent Debtors' Court vesting the defendant's estate and effects in the provisional assignee; and on the 14th of March, 1850, Archibald Mathison and James Markwell were appointed creditors' assignees. On the same day the defendant was discharged by the Insolvent Debtors' Court. Mathison subsequently died, and Markwell entered into a contract for the sale of the freehold property of the defendant; but the purchasers refused to complete, on the ground of the entry in the Master's book. Application was made to the plaintiff's attorney to consent to an entry of satisfaction of the charge upon the defendant's real estate in the Master's book; but this he declined.

Tomlinson shewed cause. The only question is, whether the Court has any power over the officer of the Common Pleas. The 1 & 2 Vict. c. 110, s. 19, enacts, that no judgment shall, by virtue of that act, affect any lands, &c., unless a memorandum containing certain particulars shall be left with the senior Master of the Court of Common Pleas, who shall enter them in a book. By sect. 13, a

judgment so entered is to operate as a charge against real estate; and by sect. 16, any judgment creditor, who shall have obtained such a charge, and who "shall afterwards, and before the property so charged or secured shall have been converted into money or realised, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment," "shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly." The act, however, does not provide that the entry is to be expunged, or that any subsequent entry is to be made. The application is entirely novel. [*Erle*, J.—We often entertain an analogous application. Where a debt is satisfied, it is the practice to obtain a Judge's order, requiring the plaintiff's attorney to attend the officer of the Court of Common Pleas, and consent to an entry of satisfaction in his book.] Here the judgment is not satisfied, although the charge upon the real estate is rendered null and void. The entry now sought to be made might be understood as a satisfaction of the judgment, and might possibly prejudice the plaintiff in an application to the Court of Chancery. In *Wells* v. *Gibbs* (*a*), Lord *Langdale* held that he had no jurisdiction to order the Master of the Common Pleas to vacate such a memorandum. [*Erle*, J.—Public convenience seems to require that where a judgment ceases to operate as a charge, the entry of it as such should no longer exist.]

At any rate, the rule cannot be absolute in terms. The defendant's assignee can have no right to make the entry, or to call upon the plaintiff to do so. He can only call upon the plaintiff to consent to the Master making the entry. [*Erle*, J.—If the parties go before the Master of the Common Pleas, and consent to his making the entry, I presume he would have no difficulty in making it. If he

(*a*) 3 Beav. 399.

had, I should not entertain any motion interfering with his discretion.] There is no precedent for the latter alternative of the rule. [*Erle*, J.—That portion will be struck out.] The conclusion of law drawn from the facts should also be omitted.

Keane, in support of the rule, was not called upon.

ERLE, J.—I think the rule must be absolute, and that the form suggested is the correct one. Where payment is made of a judgment debt, it is the practice to order the plaintiff's attorney to attend with the defendant before the proper officer, and consent to his entering up satisfaction. I think that the defendant's assignee in the present case has a right to require that the plaintiff shall attend before the senior Master of the Common Pleas, and consent to an entry on the registry book, that upon a given day the plaintiff took the defendant in execution upon the judgment; the plaintiff being paid the costs of such attendance, and of this application.

Rule absolute accordingly (*a*).

(*a*) The rule was thus drawn up: "It is ordered, that upon payment of the costs of this application, and of the plaintiff's attorney's attendance before the senior Master of the Court of Common Pleas, he shall consent to the said Master making an entry in the book in which the judgment in this cause is registered, that after the entry of the said judgment in the said book, the plaintiff took the person of the defendant in execution upon the said judgment."

Doe dem. Avery v. Langford.

January 31.
February 9.

Coram *Erle, J.*

The assignee of certain premises for the residue of a term of years became seised in fee of other premises immediately adjoining, and demised both to R. and S. She subsequently assigned her interest in the first mentioned premises to the defendant, and conveyed to him the freehold premises. After the determination of the term granted to R. and S., defendant occupied the leasehold as well as the freehold premises. Upon the determination of the first mentioned term of years, the reversioner of the premises

THIS was a rule calling upon the defendant to shew cause why the lessor of the plaintiff should not be permitted to inspect and take copies of a certain deed or writing, or deeds or writings, whereby certain leasehold property, as well as certain freehold property adjoining the same, in the parishes of Minster and Forrabury, in the county of Cornwall, were, in or about the year 1836, conveyed to the defendant, by the personal representatives of Elizabeth Kingdon, deceased.

The following facts were stated in the affidavit of the lessor of the plaintiff in support of the rule. The lands and premises sought to be recovered in this action were parcel of certain lands and premises demised by Sir J. Phillips and Ann Amy, by a lease dated the 18th of June, 1787, to Richard Kingdon, for a term of years which expired in the month of April, 1851. Before the expiration of the term, the reversion was conveyed to the lessor of the plaintiff. Richard Kingdon died in 1792, when the term became vested in Elizabeth Kingdon, who died in 1818. It then became vested in her executors, who, about the year 1836, as deponent believed, by a certain deed or deeds, or writing or writings, assigned the premises for the

comprised in it brought ejectment for a parcel of land, contending that it was part of the lands comprised in the term of years, and alleging that R. and S., and afterwards the defendant, had during their occupations, obliterated the boundaries of the freehold and leasehold land, and had encroached on the latter.

Upon a rule under the 14 & 15 Vict. c. 99, s. 6, to inspect documents, supported by an affidavit stating the above facts, and alleging that an inspection of the deeds of assignment and of conveyance to the defendant of both premises would enable the lessor of the plaintiff to prove his title to the parcel in question,

Held, that the lessor of the plaintiff was entitled to inspect the assignment of the term, but not the deed conveying the freehold hereditaments.

Held also, that the lessor of the plaintiff might, even independently of the 14 & 15 Vict. c. 99, s. 6, upon an affidavit of the loss or non-existence of the counterpart, inspect the deed creating the term.

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residue of the term to the defendant, who for a long time occupied the same. While the term was vested in Elizabeth Kingdon, she became seised of certain freehold property adjoining the land comprised in the lease, and she demised both the former and the latter to T. P. Rosevear and William Sloggett, who continued possessed thereof until the year 1836. In that year the freehold property was, as deponent believed, conveyed by the representatives of E. Kingdon to the defendant, by a certain deed or deeds, and the defendant entered into occupation of the same, and had continued ever since in such occupation. Rosevear and Sloggett during their occupation, and the defendant since then, as it was alleged, erected several buildings, and did several acts, whereby the boundaries of the freehold and leasehold property became obliterated and defaced. The affidavit went on to state that the defendant, under colour of his ownership of the freehold property aforesaid, had greatly encroached upon the boundaries of the leasehold property, and now claimed to hold as part of the former a parcel of land which deponent believed was comprised in the lease. It further stated, that if deponent were permitted to inspect the instrument whereby the lease was assigned to the defendant, and whereby the freehold was conveyed to the defendant, or so much of them as described the parcels therein assigned or conveyed to the defendant, he would be enabled to prove his title to the parcel of land sought to be recovered in the ejectment; and that he believed such inspection to be material and necessary to the establishment of his title.

The affidavit in answer was made by the defendant, and simply stated that he believed that there were counterparts of the lease, the assignment of which it was sought to inspect, in the custody and control of the lessor of the plaintiff.

The date of the demise in the declaration was the 1st of May, 1851.

Maynard shewed cause. This is an application for the inspection of documents under 14 & 15 Vict. c. 99, s. 6, and in order to bring the case within that section, three things must be shewn to exist; first, that the documents are "in the custody or under the control of" the defendant; secondly, that they relate to the case of the lessor of the plaintiff; and, thirdly, that previous to the act a discovery of them might have been obtained by filing a bill in a Court of equity.

The first objection to this rule is, that the affidavit does not shew that the deeds of which inspection are sought, are in the custody or under the control of the defendant. The onus of shewing this is upon the party seeking the discovery. Mr. *Pollock*, in his Treatise on the *Inspection of Documents*, &c., p. 49, says, "Such rule, it is apprehended, must be obtained upon an affidavit describing the required documents, and stating that they are in the custody or under the control of the opposite party," &c. So in *Wigram on Discovery*, pl. 293, 2nd ed., it is said, "the first thing to be observed is, that the *onus* is upon the plaintiff to prove his right to see the documents, the production of which he calls for, and that the only evidence upon which the Court can act in his favour is the *admission* of the defendant." [*Erle*, J.—I think we are bound to follow cy pres the doctrine of the Courts of equity. They never order the production, unless it appears upon the admission upon oath of the opposite party, that the documents are in his custody or control; but as we do not put the defendant to answer upon oath, and as there is a presumption that the title deeds are in the possession of the party to whom the property is conveyed, I think we may take it, for the present motion, as he does not deny the fact, that the title deeds are in his possession.]

2. The second objection is, that it is not shewn how the lessor of the plaintiff's case can be assisted by the inspection of the assignment of the leasehold term. [*Erle*, J.—An order for inspection and copy of the lease would be

made independently of the statute, where the party claims under the deed, and has no counterpart. The lessor of the plaintiff may have that part of the rule upon producing an affidavit to that effect.]

3. The third objection applies to that part of the rule which relates to the freehold property. As to that, the present is not a case in which discovery would be granted in equity, and, therefore, the statute does not apply. If the conveyance includes the parcel in dispute, it is part of the defendant's title, and not of the lessor of the plaintiff's: if it does not, it proves nothing in support of the lessor of the plaintiff's case. In equity, the discovery is limited to such material facts as relate to the plaintiff's case, and not to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. In *Bolton* v. *The Corporation of Liverpool* (*a*), cited in *Wigram on Discovery*, pl. 367, 2nd ed., the Lord Chancellor said, "I take the principle to be this:—a party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary." "The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But, how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the corporation's title and not his, and they are only his negatively, by failing to prove that of the corporation." "He cannot call for these documents, merely because they may, upon

(*a*) 1 Myl. & K. 88; 91—2.

inspection, be found not to prove his liability, and so to help him, and hurt his adversary, whose title they are." The deed which it is sought to inspect is the defendant's title deed. [*Erle*, J.—The deed is not privileged on that ground. Wherever it will support the opposite party's case affirmatively, the privilege is gone.]

Collier, in support of the rule. The lessor of the plaintiff shews that the leasehold and freehold property adjoin. If the land in dispute is not included in the conveyance of the freehold property, it will be strong evidence that it was part of the leasehold. [*Erle*, J.—It does not at all follow that if not included in the freehold, it is part of the leasehold.] The defendant will contend that it is part of the freehold property, and whether the evidence applies to the lessor of the plaintiff's case, or by way of reply to the case set up on the part of the defendant, is indifferent. [*Erle*, J. —I cannot agree with you. I think it makes all the difference. The case of *Bolton* v. *The Corporation of Liverpool* is against you.] The doctrine in that case has since been considerably modified. In the case of *The Attorney General* v. *Thompson* (*a*), the plaintiff claimed the reversion in lands which, he alleged, were in the possession of the defendant as the assignee of a lease only, and the defendant claimed to be entitled to the lands in fee, but admitted that he derived his title under a person alleged by the plaintiff to have been lessee, and that the parcels described in the deed under which he claimed partly, but not wholly, corresponded with the parcels described in the alleged demise; and it was held that the plaintiff was entitled to a production of so much of the purchase deed as described them. The lessor of the plaintiff alleges what almost amounts to a fraud, and if he were to proceed in equity, he would be entitled to a fuller disclosure on interrogatories than he now asks. [*Compton* v. *Earl Grey* (*b*) was also referred to in the course of the argument.]

(*a*) 8 Hare, 106. (*b*) 1 Y. & J. 154.

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Doe dem. AVERY v. LANGFORD.

ERLE, J.—I think the lessor of the plaintiff is entitled to that part of the rule which relates to the inspection of the lease and assignment, upon his producing an affidavit that he has no counterpart of the lease, and upon payment of the usual costs. I will consider the other branch which relates to the freehold conveyance.

Cur. adv. vult.

In the Vacation after this Term (February 9), ERLE, J., delivered judgment.—

In this case the lessor of the plaintiff is entitled to a rule for inspection and copy; 1, of the original deed granting the term, on his producing an affidavit of not having a counterpart; and 2, of so much of the deed conveying the same to the defendant as contains the assignment of the term.

I think, however, that he is not entitled to an inspection of the title deed to the freehold of the defendant; that deed proving no part of the plaintiff's title to the land in question.

This case is governed by *Bolton* v. *The Mayor, &c. of Liverpool* (*a*), and the facts do not bring it within the decision in *The Attorney General* v. *Thompson* (*b*).

Rule accordingly.

(*a*) 1 Myl. & K. 88.

(*b*) 8 Hare, 106.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Easter Term.

IN THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who usually sat in the Bail Court in this Term was COLERIDGE, J.

SMALL *v.* BATHO. *May* 3.

Coram *Wightman, J.*

BARSTOW moved to review the Master's taxation in the above cause.

The action, it appeared, was in trespass for criminal conversation. With the view of proving the identity of the defendant, the plaintiff's attorney wrote to the attorney for the defendant, requesting that the defendant should appear in Court at the trial, or appoint a time for being seen by some witnesses of the plaintiff. No answer having been received to that application, the witnesses in question were brought to town some days before the trial, in order that they might see and identify the defendant.

Witnesses were brought to town some days before the trial, for the purpose of enabling them to identify the defendant: *Held*, that the costs of their attendance were rightly disallowed, as being in effect costs incurred in qualifying them to give evidence.

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SMALL v. BATHO.

At the sittings in London after last Hilary Term, a verdict was taken by consent for the plaintiff for 200*l.* The present motion was made because the Master had, on taxation, refused to allow the expenses of the attendance of these witnesses for the days before the trial.

Barstow. The Master should have allowed the costs of the attendance on those days during which the witnesses were in town to identify the defendant, as such costs were necessarily and properly incurred in support of the plaintiff's case. The practice with regard to allowing costs has become more liberal of late years. Thus the expenses of maps and plans are now allowed as costs in the cause (*a*). [*Wightman*, J.—The case of *Gravatt* v. *Attwood* (*b*) is expressly in point against you.] That case comes within the rule which disallows the costs of instructing scientific witnesses for the purpose of enabling them to give evidence. In the present case the costs were incurred for the purpose of ascertaining that the evidence, which the witnesses had to give, related to the defendant.

WIGHTMAN, J.—Whether the costs are incurred in ascertaining what the work is, to the value of which the witnesses speak; or who the person is, to whom their evidence relates: such costs are, in effect, incurred in qualifying the witnesses to give evidence, and are properly disallowed as costs in the cause.

Rule refused.

(*a*) See *Pilgrim* v. *The Southampton and Dorchester Railway Company*, 3 C. B. 25.

(*b*) *Ante*, p. 27.

CRAWSHAW and Another *v.* The YORK AND NORTH MIDLAND RAILWAY COMPANY.

May 4, 5.

Coram *Wightman, J.*

Debt for work and labour, &c. Before issue joined, the cause and all matters in difference were referred, the costs of the action, reference and award, to abide the event of the award. At the hearing, it appeared that four contracts had been entered into by the plaintiffs with the defendants for the construction by the former of four distinct but continuous portions of a single line of railway; and that the chief matter in difference was, whether a double line of railway afterwards constructed instead of a single line, and some extensions of the line, were to be charged for upon the terms contained in the contracts. The arbitrator having awarded that the plaintiff had a good cause of action, and that in respect of it and of the matters in difference, the defendants should pay to the plaintiffs a certain sum.

Held, on motion to set aside the award,

1. That it was not bad for uncertainty, as the arbitrator was not bound to make a separate finding as to each contract with a view to an apportionment of costs.

S. *TEMPLE* moved for a rule calling on the plaintiffs to shew cause why the award made herein should not be set aside, or otherwise dealt with as the Court might direct.

The following facts appeared upon the affidavits. The defendants, a railway company incorporated by act of Parliament, advertised for tenders for the construction of four distinct but continuous portions of their line. The plaintiffs made tenders for each portion, which were accepted; and on the 17th of September, 1844, four contracts in writing were entered into between the plaintiffs and the defendants, each for the construction, at a stipulated price, of a single line of railway upon one of the parts of the line. Each contract contained a clause providing that charges for alterations, omissions or additions made upon a written order signed by the assistant engineer, should be paid for according to schedules of prices annexed to the contract. Soon after the works were commenced, a verbal order was given for the construction of a double, instead of a single, line of railway, and of three short extensions of the main line, which the plaintiffs accordingly executed. The works were finished and delivered up to the company in July, 1846; and in September in the following year, the plaintiffs delivered an account, divided into seven portions; four, for work done under the four contracts,

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CRAWSHAW and Another v. YORK and NORTH MIDLAND RAILWAY Co.

and three, for the three extensions. The charges, however, were on a higher scale than the prices contained in the schedules. In the following month the plaintiffs commenced the present action. The declaration was in debt for work and labour, and for the carriage of goods, with the common money counts. Before plea, a Judge's order was made, on the 27th of November, 1849, referring "the cause and all other matters in difference between the parties thereto respecting the construction or maintenance of the works of the defendants' railway, and all claims of the plaintiff in respect thereof, and all counter claims of the defendants, to the award of," &c., and ordering "that the costs of the action, and the costs of the reference and award, and costs of" a previous reference under an order which had been subsequently rescinded, "should abide the event of the said award, without the necessity of any specific finding of the event of the action appearing on the said award." At the hearing before the arbitrator, the plaintiffs contended that the contracts were not binding on them, as the defendants had departed from them in several particulars. The facts as to each contract were separate and distinct, and some were admitted, and others denied by the defendants. The chief matter in dispute, however, was whether the second line of railway and the three extensions were "additions" within the meaning of that term in the contracts, and therefore to be paid for according to the schedules of prices; or whether they were independent of the contracts, and to be paid for without reference to them. Besides these matters there was a claim of 250*l.* for repairing an engine of the plaintiffs, which had been run into by one of the defendants' engines; and a claim of 180*l.* for three waggons alleged to have been omitted to be delivered by the defendants: both of which were disputed by the defendants. The payments admitted to have been made amounted to 224,889*l.* 6*s.*, and the balance claimed was 142,560*l.* 6*s.* 8*d.* On the 12th of April, 1852, the arbitrator made his award, whereby he awarded "as to the said cause and all other

the matters in difference, and all claims, demands, and counter claims between the said parties thereto, and to this reference, and all other the premises whatsoever referred to him," "that the plaintiffs had a good cause of action against the defendants in the said cause; and in respect of the said cause of action and matters of difference between the said parties and other the premises as aforesaid, that the defendants do pay to the plaintiffs 34,176*l.* 2*s.* 8*d.*" And he further awarded that the defendants "had not any claim, counter-claim, or other demand against the plaintiffs, or either of them, in respect of the said cause or matters and other the premises so referred to him, or any of them."

S. Temple. The award is bad for uncertainty,—the arbitrator not having made any distinct and separate finding in respect of the several matters in difference referred to him. As the costs were to abide the event of the award, the arbitrator should have found separately as to each distinct subject-matter of claim, so as to admit of an apportionment of the costs being made. If the general issue had been pleaded, and the cause had proceeded to trial, the jury might have found the issue distributively, as to one or more of the contracts for the plaintiffs, and as to the others for the defendants, and the costs would have been taxed accordingly. It cannot affect the principle upon which the costs should be taxed, that no issue was joined. [*Wightman*, J.—According to your argument, in every action of indebitatus assumpsit where there are several items of demand, and the plaintiff succeeds on all but one, the defendant is entitled to have the general issue found distributively, and to have the costs in respect of the claim on which he has succeeded.] That would be so, wherever the item does not form a part of a single contract, but is a separate cause of action, or a distinct part of one entire cause of action (*a*). In trover for articles A., B.,

(*a*) See per *Parke*, B., in *Anderson* v. *Chapman*, 5 M. & W. 489, 490.

and C., if the jury find for the plaintiff as to article A., and for the defendant as to B. and C., the defendant is entitled to such portion of the costs as relates to B. and C. [*Wightman*, J.—In trover there is a separate finding as to the articles sought to be recovered by the jury.] In *Prudhomme* v. *Fraser* (*a*), which was an action for libel, the declaration contained several innuendoes, some of which the jury affirmed, while they negatived others; and although the Court refused to grant a new trial because a general verdict was taken for the plaintiff, they held that the defendant was entitled to his costs as to so much of the declaration as charged libellous matters, the innuendoes respecting which had been negatived. In *Daubuz* v. *Rickman* (*b*), which was an action for breach of covenant, the cause was referred before issue joined, the costs of the cause to abide the event of the award. The arbitrator having found that the plaintiff had sustained damage upon one of the breaches of covenant, but that as to the rest, he had no cause of action against the defendant, it was held that the defendant was entitled to the costs of those breaches which were found in his favour. So in *Doe* d. *Errington* v. *Errington* (*c*), where a declaration in ejectment, containing only one count and one demise, claimed several messuages, and the jury found a verdict of not guilty as to one messuage, and guilty as to the rest, the defendant was held to be entitled to his costs as to that messuage with respect to which the plaintiff failed. [*Wightman*, J.—There is no doubt that the rule is so in ejectment. In *Anderson* v. *Chapman* (*d*), which was an action in assumpsit for negligence against carriers by sea in improperly stowing casks of tallow, to which the defendants pleaded a denial of the negligence; the plaintiffs failed to prove negligence in stowage, but proved a damage to one cask by negligence in

(*a*) 2 A. & E. 645; S. C. 4 N. & M. 512.

(*b*) 1 Scott, 564; S. C. 4 Dowl. 129.

(*c*) 4 Dowl. 602. See *Doe* d. *Hellyer* v. *King*, 2 L. M. & P. 493.

(*d*) 5 M. & W. 483; S. C. 7 Dowl. 822.

loading, in respect of which alone they obtained damages; and it was held that the defendants were not entitled to a verdict or costs upon the above issue in respect of the rest of the casks.] That case stands alone, and the decision is maintainable perhaps on this ground that there the single question to be tried was whether the defendants were guilty of negligence. [*Wightman*, J.—So here, if the cause had gone to issue, the question would have been whether the defendants ever were indebted to the plaintiffs for work and labour, &c. It is analogous to the case of covenant for non-repair with a single general breach, but with several items of charge, to which the defendant pleads performance generally. There, if the plaintiff fails as to one item of charge, the defendant is not entitled to costs as to that item.] If the award, in its present state, is good, it would follow that if the arbitrator had been of opinion that the plaintiffs were not entitled to recover in respect of the principal matters in dispute, but only as to a minor matter, such as the damage to the plaintiff's steam engine, &c., and, without finding upon each matter had awarded a gross sum, however small, the defendant would have been liable to pay the whole costs of the award. [He referred to the judgment in *Gravatt* v. *Attwood* (*a*).]

Cur. adv. vult.

The following judgment was delivered (May 5th) by COLERIDGE, J. for

WIGHTMAN, J.—I think there should be no rule for the reasons mentioned when this motion was made yesterday. The case appears to me to fall directly within the decision in *Anderson* v. *Chapman*, and is distinguishable from all those cited by Mr. *Temple*. It is unsupported by any authority and is altogether a novel application.

Rule refused.

(*a*) *Ante*, p. 27, 30.

May 6

REGINA *v.* THE RECORDER OF LEEDS.

Coram *Coleridge, J.*

The justices in petty sessions verbally adjudged A. B. to be the putative father of twin bastard children, and ordered him to pay a weekly sum for their support; against which order he immediately gave notice of appeal. A separate order as to each child was drawn up, and the father entered into two separate recognizances to try an appeal against each order. The notice, however, which he gave the mother under the 8 & 9 Vict. c. 10, s. 3, stated that he had entered into "a recognizance" to try "an appeal" against "an order of affiliation," "whereby" he was "adjudged to be the putative father of two bastard children," &c.

THIS was a rule calling on the Recorder of Leeds to shew cause why a writ of mandamus should not issue, commanding him to enter continuances and hear an appeal against a bastardy order.

The following facts appeared upon the affidavits. Mark Barker having been summoned to attend on the 27th of last December, before the justices in petty sessions at Leeds, to answer the complaint of Jane Tasker, of being the father of twin bastard children of which she had been delivered, his attorney attended accordingly; and the justices, after hearing the evidence, verbally adjudged him to be the putative father, and ordered him to pay 1*s.* per week for each child. His attorney immediately gave the mother notice of his intention to appeal to the next quarter sessions. Two separate orders, one for each child, describing it as one of twins, were afterwards drawn up, and copies served on the appellant. On the 31st of December, the appellant entered into two recognizances to prosecute the appeals against each order; and notice that the recognizances had been entered into was given on the 5th of January to the mother, pursuant to 8 & 9 Vict. c. 10, s. 3, in the following form:—"as attorneys for and on behalf of Mark Barker," "we do hereby give you notice, that the said Mark Barker has entered into a recognizance before Charles Gascoigne Maclea, Esq., one," &c., "to try an appeal at the next general quarter sessions, to be holden at," &c., "against an order of affiliation, made on the 27th of December last,

The sessions having refused to hear the appeal, on the ground that the above notice was insufficient:

Held, that the notice reasonably construed gave sufficient information; and that a mandamus would therefore lie to the sessions to hear the appeal.

whereby the said Mark Barker was adjudged to be the putative father of two bastard children, of which you, Jane Tasker, had then lately been delivered." "Dated," &c. "Signed," &c., "attorneys for the said Mark Barker." The next quarter sessions were held on the 4th of March, when two appeals were entered, one against each order. When the first of these appeals was called on, the appellant was required to prove that he had given a notice of recognizance; and upon his proving the above notice, the respondents objected that it was insufficient, as there was no such recognizance or order as therein described. The recorder held the objection fatal, and dismissed the appeal. The second appeal was then called on, the same proof required, the same objection made and entertained, and that appeal also dismissed (*a*).

Pickering shewed cause. The recorder rightly held the notice to be insufficient, as no such recognizance as the one described in it had been entered into, nor was there any such appeal, or any such order in existence, as those referred to in it. The 7 & 8 Vict. c. 101, s. 4, confers upon the putative father the right of appeal, on giving notice of his intention to the mother, and entering into a recognizance for the payment of costs. The 8 & 9 Vict. c. 10, s. 3, requires that he "shall forthwith give or send a notice in writing of his having so entered into such recognizance," "and unless he shall enter into the recognizance," &c., "and in default of his giving or sending such notice or notices as aforesaid, the appeal shall not be allowed." The right of appeal being given by the statute, the conditions prescribed should be strictly followed; *Rex* v. *The Inhabitants of Kimbolton* (*b*), and *Rex* v. *The Justices of Lincolnshire* (*c*). The case of *Rex* v. *The Justices of the*

(*a*) There was a similar rule to the present with respect to that appeal.

(*b*) 6 A. & E. 603; S. C. 1 N & P. 606.

(*c*) 3 B. & C. 548; S. C. 5 D. & R. 347.

West Riding (*a*), may perhaps be relied on in support of this rule; but there the appellant properly gave three notices of appeal against three orders, and it was only by the act of the clerk of the peace that the entry was made as of one appeal. A single order of maintenance, including both children, would have been bad; *In the matter of Morten* (*b*). Here there were two orders, two recognizances, two appeals; and, consequently, there ought to have been two notices. Probably one would have been sufficient, if it had stated that recognizances had been entered into to prosecute two appeals against two orders according to the fact. The case of *Reg.* v. *Holborow* (*c*), merely decides that the notice need not state the conditions of the recognizance. In *Reg.* v. *The Justices of Oxfordshire* (*d*), a joint notice of appeal against "a conviction of us" was held sufficient, although there were three defendants and three separate convictions; but in that case there was only one conviction against each defendant, and there could be no doubt, therefore, as to the conviction to which the notice of appeal applied. If the statement in the notice were true in fact, and the appellant had entered into such a recognizance as the one described, the mother, although successful, would be unable to recover her costs, as it would be doubtful to which appeal the recognizance would apply. A defendant might be convicted of several offences of a distinct kind on the same day before the same magistrate, and with such a notice as this, it would be impossible for the respondent to know against which conviction the appeal was intended to be brought.

G. Hardy, in support of the rule. As it is conceded that a single notice relating to both recognizances would have been sufficient, the only question is, whether the notice given does not in effect relate to both. In *Reg.* v. *The*

(*a*) 4 B. & Ad. 685.
(*b*) 1 New Sess. Ca. 69.
(*c*) 3 New Sess. Ca. 723.
(*d*) 4 Q. B. 177.

Justices of Denbighshire (*a*), this Court held that a notice of appeal against an order of removal, which mis-stated the Christian name of one of the magistrates, was good, as the description was sufficient to give reasonable information. The case of *Reg.* v. *The Justices of Oxfordshire* (*b*) establishes the same principle. There the notice described the conviction as joint, whereas it was several; yet the Court held the notice sufficient. Lord *Denman*, C. J., in giving judgment, says, "The question must be, whether there can be any doubt as to the order to which the notice refers; here there could be none." In the present case the substantial requirements of the statute were complied with by the appellant entering into the proper recognizances; and the only object of the notice to the mother was attained by bringing her to the sessions to answer the appeal. The statute, in requiring this notice to be given, intends it as a notice of trial, and such notices are not to be construed strictly. In *Jones* v. *Nicholls and Another* (*c*), the question turned upon the construction to be put upon a notice of action given to a constable; and the Court said, "We must import a little common sense into notices of this kind." In *Reg.* v. *Holborow* (*d*), it was argued that the notice should state the condition of the recognizance, because the statute uses the words, notice of "*such* recognizance;" but the Court declined to put this strict construction on its terms. *Erle*, J., in delivering judgment, says, "I think that the notice to the mother was sufficient to satisfy the statute. The recognizance which would be returned to the sessions would shew if the appellant had a locus standi in Court."

COLERIDGE, J.—It seems to me that this rule should be made absolute. Looking at the intention and meaning of

(*a*) 9 Dowl. 509. See *Reg.* v. *The Justices of Middlesex*, 3 D. & L. 745.

(*b*) 4 Q. B. 177, 181.

(*c*) 13 M. & W. 361; S. C. 2 D. & L. 425.

(*d*) 3 New Sess. Ca. 723, 5.

the act which requires the notice to be given, and the principle of construction adopted in the case of *Reg.* v. *Justices of Oxfordshire* (*a*), I am of opinion that this notice was sufficient. The act was framed to obviate all objections beside the merits with regard to orders in bastardy. The preamble recites that "divers questions have been raised as to the validity" of orders "wholly beside the merits of the cases;" and that it was "desirable to remove such questions, and to prevent the recurrence of the same or similar questions in future;" and the third section, after stating what shall be the condition of the recognizance which by the former act the putative father is required to give, enacts, that he shall "forthwith give" "a notice in writing of his having so entered into such recognizance;" "and unless he shall enter into the recognizance," "and in default of his giving" "such notice," "the appeal shall not be allowed."

Here the justices, in the first instance, verbally adjudge the defendant in one sentence to be the putative father of the two children, and order him to pay one shilling a week for each child. The father gives a notice of appeal against this decision. A separate order is afterwards properly drawn up as to each child, and the defendant enters into two separate recognizances to try an appeal against each order. He gives a notice of his having entered into "a recognizance" to try "an appeal" against "an order," &c. It is not disputed that the notice of appeal is good, and that proper recognizances were entered into. The only question is, whether the notice of recognizance is sufficient.

Cases may be supposed, as Mr. *Pickering* suggests, where a man has been convicted on the same day of several distinct offences of different natures, and where a notice of this kind would only mislead or give no certain information; but here the notice, after stating the appeal against the order of justices, describes the offence,

(*a*) 4 Q. B. 177.

"whereby" the appellant "was adjudged to be the putative father of two bastard children," &c.

It is said, however, that there is no such order as the one so described, and that no such adjudication could have properly been made. But what meaning does the language of this notice convey, unless it refers to the order of justices first verbally made, and afterwards formally reduced into two separate orders? I have no doubt it did, and necessarily would convey sufficient information to answer all the purposes of the statute. Then are we tied to a strict and technical construction? I think not. The statute, though it contains a schedule of forms, gives no form of a notice of this description; leaving it open, therefore, to the parties to adopt whatever language they please to convey the requisite information. The case of *Reg.* v. *The Justices of Oxfordshire,* lays down the principle that the point to be considered is whether, looking at the circumstances of each particular case, the notice, reasonably construed, gives sufficient information. The notice in that case, if read literally, would have been bad, for it purported to be in respect of an appeal against a conviction of "us three:" yet it was held sufficient as a notice in respect of a separate conviction of each of the three.

I am, therefore, of opinion that the learned Recorder was wrong in the view he took of this case, and that the rule for a mandamus must therefore be made absolute.

Rule absolute.

May 1, 7.

REGINA *v.* T. J. BIRCH, ESQ.

In the matter of a Plaint of

WILDE *v.* SHERIDAN.

Coram *Coleridge, J.*

The acceptance of a bill, though revocable at any time before delivery, is, if unrevoked, complete as soon as written on the bill: and the contract is made in that place where the bill is accepted, not where it is issued.

A bill of exchange was drawn by plaintiff at Norwich upon the defendant in London. The defendant there wrote upon it his acceptance "payable at R. and Co., London," and sent it back by post to plaintiff at Norwich. At maturity the bill was dishonoured and returned to plaintiff at Norwich. The latter having sued the defendant upon the bill in the County Court of Norfolk:

Held, upon motion for a prohibition, that the County Court had no jurisdiction, as "the cause of action," within the meaning of those words in 9 & 10 Vict. c. 95, s. 60, did not arise within the district of that Court.

THIS was a rule for a prohibition to the judge of the County Court of Norfolk, held at Norwich, to prohibit all further proceedings in the above plaint.

The following facts appeared upon the affidavits. The plaint was brought upon a bill of exchange for 25*l.*, dated the 2nd of December, 1845, drawn by the plaintiff, at Norwich, upon the defendant, to whom it was addressed at 26, Gresham Street, London, and payable three months after date. It was sent to London for acceptance, and the defendant accepted it there, "payable at Robarts and Co., Bankers, London:" he then enclosed it in a letter, which he sent from London by post to the plaintiff at Norwich, who received it there, and afterwards negotiated it in the same place. The bill was dishonoured at maturity and returned to the plaintiff; who, having first obtained the leave of the Judge of the Court, levied the present plaint upon it. When the case came on for trial, it was objected that the judge had no jurisdiction over it, as the whole cause of action had not arisen within the district of the Court; but the objection was overruled, and judgment given for the plaintiff. The defendant stated in his affidavit that he did not reside, and had never been at Norwich, or within the jurisdiction of the County Court of that place.

Phipson shewed cause for the plaintiff. The 60th section

of the 9 & 10 Vict. c. 95 (*a*) enacts, that a summons may issue, among other cases, out of the Court for the district in which the cause of action arose: and it is admitted that the plaintiff must shew that the cause, that is, the whole cause, of action arose at Norwich. The cause of action is not the contract, but the breach of the contract. The acceptance of the bill at "Robarts and Co., Bankers, London," is not special: it was the defendant's duty, therefore, upon the bill becoming due, to follow his creditor to whatever place he might then be, and pay him there. The bill and the plaintiff were at Norwich when it became payable, and it was the defendant's duty to go there. The breach of the promise arose there, and there only: consequently the cause of action arose wholly within the jurisdiction of the Norfolk County Court.

But even if the promise be the cause of action, or a part of it, the cause of action in the present case arose wholly within the district of the Court. The promise was made by the acceptance of the bill; and, it is true, the defendant wrote in London the words on the face of the bill signifying that he accepted it. As long, however, as the bill continued in his possession, that act only amounted to an inchoate acceptance, which might have been revoked at any time before the bill was delivered to the plaintiff (*b*). The cases also shew that a fresh stamp would have been unnecessary, if the bill had been altered after the acceptance had been written, but before the instrument had been issued (*c*). The acceptance, in a word, is not complete

(*a*) "That such summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts."

(*b*) See *Cox* v. *Troy*, 5 B. & A. 474; S. C. 1 D. & R. 38, referred to in the judgment, *post*, p. 61.

(*c*) See *Downes* v. *Richardson*, 5 B. & A. 674; S. C. 1 D. & R 332.

until delivery, which is as essential to it as it is to a complete indorsement (*a*). The averment, in pleading, that a bill was accepted, involves the allegation that it was delivered (*b*), as much as the same allegation is included in the statement that a bill was made (*c*). The bill was sent by post to the plaintiff. It was delivered to him at Norwich: by that delivery the acceptance became complete, and it became complete at the place where the delivery was made. The promise, consequently, was made at Norwich, and if it be the cause of action, the County Court had jurisdiction to try the plaint founded upon it.

The cases cited when this rule was obtained were *Buckley* v. *Hann* (*d*) and *Roff and Another* v. *Miller* (*e*). One of the questions which arose in the former case was, whether the cause of action arose within the city of London or not. The bill upon which the defendant, an indorser, was sued in the superior Court, had been drawn and accepted in the city. The defendant, also, had written his indorsement upon it there, but he sent it by a messenger to the plaintiff, who lived beyond the limits of the London Small Debts' Court: and *Parke*, B., said, "I think the cause of action means the whole cause of action, and that was the indorsement, which took place out of the city." This decision is in favour of the plaintiff, for it establishes that there was no indorsement until the bill was delivered to the plaintiff, and that the indorsement was made at the place of the delivery. *Roff and Another* v. *Miller*, indeed, would seem to be at variance with the last mentioned decision. There the bill was accepted—that is, the acceptance was written—by the defendant in Piccadilly, but it was delivered to the plaintiffs at Billingsgate in the city of London: and *Cresswell*, J., is

(*a*) See *Marston* v. *Allen*, 8 M. & W. 494; S. C. 1 Dowl. N. S. 442.

(*b*) See *Smith* v. *McClure*, 5 East, 476; S. C. 2 Smith, 43, referred to in the judgment, *post*, p. 61.

(*c*) See *Churchill* v. *Gardner*, 7 T. R. 596.

(*d*) 19 Law Journ. Ex. 151, 2. S. C. 5 Exch. 43; 7 D. & L. 188.

(*e*) Com. Pleas, East. Term, 1850, cited from 19 Law Journ., C. P. 278.

reported to have said, "The cause of action here was not the delivery of the bill at Billingsgate, but the unrevoked acceptance at Piccadilly." This, however, must be a mistake; for it is not the promise, but the breach of it, which is the cause of action. [*Coleridge*, J.—That view does not appear to have been adopted or even suggested in either of the cases cited. Suppose the question arose upon an issue on a plea of the Statute of Limitations, when, do you say, would the cause of action be said to arise? from the time of the promise, or of the breach?] From the breach. The question is, at what moment is an action first maintainable? None can be brought on a bill until the bill be due. In *Heath* v. *Long* (*a*), it was held that the breach of the promise was, at least, a material point of the cause of action.

Joyce, in support of the rule. If it appear that the cause of action did not arise wholly within the jurisdiction of the County Court, the rule must be made absolute. That does sufficiently appear: for the writing of the acceptance was a material point of the cause of action. But further, the acceptance was complete as soon as the defendant posted the letter which contained the bill: the promise, therefore, upon which he was sued was completely made out of the jurisdiction of the County Court. The defendant might, it is true, have revoked his acceptance before he sent the bill to the plaintiff; but not having done so, the promise was completed in London, and the cause of action arose there: and as, in *Roff and Another* v. *Miller*, "the cause of action," according to *Cresswell*, J., "was not the delivery of the bill at Billingsgate, but the unrevoked acceptance at Piccadilly;" so here, the cause of action is not the delivery of the bill at Norwich, but the unrevoked acceptance in London.

Cur. adv. vult.

(*a*) 1 L. M. & P. 333.

COLERIDGE J., in the present Term, (May 7th), delivered judgment.—

This was a rule for a writ of prohibition to the Judge of the County Court of Norfolk. The action was by the drawer against the acceptor of a bill of exchange, drawn at Norwich on the defendant in London, accepted in London, payable at Messrs. Robarts and Co., and sent by the defendant so accepted to the plaintiff in Norwich, in which jurisdiction the plaintiff sues by leave of the Judge.

The question upon the 9 & 10 Vict. c. 95, s. 60, is whether the cause of action,—that is, the whole cause of action,—arose within the jurisdiction of that County Court; and I am of opinion that it did not. Assuming that the cause of action was made up of the contract and the breach of it, it was argued against the rule, that this being a general acceptance, the defendant was bound to pay every where, and therefore at Norwich, where the plaintiff was when the bill became due; that the breach, therefore was at Norwich, by the nonpayment there at maturity, (which obviously may be true, without deciding this rule); and further, that the acceptance itself was not perfect until the bill had been delivered to the plaintiff at Norwich, so that the contract must be considered as having been made there. *Buckley* v. *Hann* (*a*) was cited in support of this latter position, in which an *indorsement* on a bill of exchange written by the defendant in London, and sent by a messenger to the plaintiff at his residence in Middlesex, was held by the Court of Exchequer to be an indorsement made in Middlesex, the mere writing without the delivery being insufficient to constitute an indorsement.

But it was admitted that where an *acceptance* had been written in Piccadilly in one jurisdiction, and given to the drawer at Billingsgate in another, the cause of action was held complete in the former jurisdiction by the Court of Common Pleas; *Roff and Another* v. *Miller* (*b*). This case

(*a*) 5 Exch. 43; S. C. 7 D. & L. 188.
(*b*) 19 Law Journ., C. P. 278.

was decided soon after the former, which appears to have been cited in the argument. But, in truth, the cases do not govern each other, and both appear to me well decided. One purpose of an indorsement is to pass the property in the bill, and that purpose is not effected until actual or constructive delivery. But the acceptor has no property in the bill either before or after an acceptance; he must be supposed to receive the drawer's paper, and on it to write his promise, without thereby in any way altering the property in the bill. He may, indeed, before any communication to the drawer of the act done, revoke it, according to *Cox* v. *Troy* (*a*) and modern authorities; but his promise, unless so revoked, is complete and takes effect from the time when it was made. In saying this I am aware of a sentence in Mr. Justice *Bayley's* judgment in that case (*b*); but I think his language is to be construed with reference to the question then before the Court, which was merely the revocability of an acceptance before communication of it to the holder. In *Smith* v. *M'Clure* (*c*), a declaration stating the delivery of a bill by the plaintiff, the drawer, to the defendant, and an acceptance by him, was demurred to because it did not go on to state a delivery back by the defendant to the drawer. Lord *Ellenborough* said, the acceptance admitted by the demurrer must be taken to be perfect, and if after such an acceptance the acceptor *improperly detained the bill* in his hands, the drawer might nevertheless sue him on it. It may be said indeed that this decision only proves that a perfect acceptance, whatever that imports, gives a right of action, because it implies whatever is necessary to make it perfect; but Lord *Ellenborough's* language imports at least, that an acceptance might, in his opinion, be perfect without delivery, for he considers it may be perfect, though the bill be *detained* in the acceptor's hands.

In the present case, however, the acceptance has been

(*a*) 5 B. & A. 474.
(*b*) Id. 478, 9.
(*c*) 5 East, 476.

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delivered; and the question is where the contract, which that acceptance raises, is to be considered as made? Upon this point Mr. Justice *Story* is very explicit in his *Conflict of Laws*, s. 317. "Acceptances of bills" "are deemed contracts of acceptance in the place where they are made, and where they are to be performed. So, *Paul Voet.* lays down the doctrine: 'quid si de literis Cambii incidat quæstio; quis locus erit spectandus? Is spectandus est locus, ad quem sunt destinatæ, et ibidem acceptatæ.' But, suppose a negotiable acceptance, or negotiable note made payable generally without any specification of place; what law is to govern in case of a negotiation of it by one holder to another in a foreign country, in regard to the acceptor or maker? Is it a contract by them to pay in any place where it is negotiated, *so as to be deemed* a contract of that particular place, and governed by its laws? The supreme Court of Massachusetts have held, that it creates a debt payable any where, by the very nature of the contract; and it is a promise to whosoever shall be the holder of the bill or note. Assuming this to be true, still it does not follow that the law of the place of negotiation is to govern; for the transfer is not, as to the acceptor or maker, a new contract; but it is under, and a part of the original contract, and springs up from the law of the place where that contract was made. A contract to pay generally is governed by the law of the place where it is made; for the debt is payable there, as well as in every other place. To bring a contract within the general rule of the lex loci, it is not necessary that it should be payable" [to be performed] "exclusively in the place of its origin. If payable" [to be performed] "every where, then it is governed by the law of the place where it is made; for the plain reason, that it cannot be said to have the law of any other place in contemplation, to govern its validity, its obligation, or its interpretation. All debts between the original parties are payable every where, unless some special provision to the contrary is made; and therefore the rule is, that debts have no situs; but accompany

the creditor every where. The holder, then, takes the contract of the acceptor or maker, as it was originally made, and as it was in the place where it was made. *It is there that the promise is made to him to pay every where.*"

There can be no doubt upon this, that where a bill is sent from one country by the drawer to the drawee in another, who there accepts it and returns it to the drawer, both *Voetius* and *Story* would hold that the contract raised by the acceptance was made in the country of the drawee, that being the place "ad quem destinatur et ibidem acceptatur." The contract accordingly, in this case, was made in London, and therefore the whole cause of action did not arise in Norfolk. It follows that the Judge of the Norfolk County Court had not jurisdiction, and the rule for a prohibition must be absolute.

Rule absolute.

ETISON *v.* WOOD, LAMBERT and SMITH.

May 7.

Coram *Coleridge, J.*

In an action against three defendants upon bills of exchange, service of a rule nisi to compute upon the attorney of two, is sufficient.

PHIPSON moved to make absolute a rule to compute. The action was brought upon three bills of exchange, accepted by the three defendants, and indorsed to the plaintiff. Lambert and Smith appeared by attorney; but it was not shewn how Wood appeared. All three suffered judgment to go by default. The rule nisi was served only upon the attorney of Lambert and Smith; and the question was, whether this was a sufficient service on all the defendants. *Figgins* v. *Ward* (*a*) was referred to, where the action was against three defendants on a promissory note, and service of the rule nisi upon one of them was

(*a*) 2 C. & M. 424; S. C. 2 Dowl. 364.

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held sufficient; *Bayley*, B., saying, "By suffering judgment to go by default, they acknowledge a joint cause of action, and therefore, quoad hoc they are partners:" an authority followed by *Parke*, B., in *Arnold* v. *Evans* (*a*). Here, it was observed, the service had not been effected upon any of the parties, but only on the attorney of two of them; but although it was not his duty to communicate the fact to the third, he was bound to inform his own clients of the service, and notice to them was notice to their co-defendant.

PER CURIAM.

Rule absolute.

(*a*) 9 Dowl. 219; S.C. *nom. Amlot* v. *Evans*, 7 M. & W. 462. See also *Carter* v. *Southall*, 3 M. & W. 128.

May 8.

Ex parte FARRANT, in re GODERICH.

Coram *Wightman, J.*

A Judge's order was, upon an affidavit that it had been served and disobeyed, made a rule of Court; and it was made part of such rule, in pursuance of Reg. Gen., 27th May, 1840, that the costs of making the order a rule of Court should be paid by the party against whom the order was made.

THIS was a rule calling on Mr. Goderich to shew cause why so much of a rule making an order of *Erle*, J., a rule of Court, as ordered that the costs of making it a rule of Court should be paid by Mr. Farrant, should not be rescinded.

Goderich, it appeared, had been the attorney of one Andrew Farrant, who had died, leaving Mr. Farrant his heir at law. Goderich prepared A. Farrant's will, to try the validity of which the heir brought an action of ejectment. Goderich's bill of costs contained a charge for

The Court, upon an affidavit shewing that there had been no disobedience, rescinded so much of the rule as related to the costs, although no demand of them had been made.

drawing the will, and another for redrawing two sheets of it; and upon Farrant's application, *Erle*, J., in November last, ordered Goderich to deliver up the "draft or drafts" of the will. Goderich accordingly delivered up the draft of the will, but he did not give up the two sheets; averring that he had them not. Farrant thereupon obtained a rule absolute, making the order a rule of Court (*a*); and having made and filed an affidavit that the order had been served on Goderich, and disobeyed, it was made part of the rule, in pursuance of Reg. Gen., 27th of May, 1840 that the costs of making the order a rule of Court should be paid by Goderich. It was now sought to rescind this part of the order, upon an affidavit by Goderich that he had not at the time when the demand was made, nor since, the sheets in question in his possession.

Pashley shewed cause. He contended that the application was too early, as Goderich had not been asked to pay the costs of making the order a rule of Court.

Phinn, contrà, was not heard.

WIGHTMAN, J.—It seems to me that this application is not unreasonable. It is the only mode which the applicant has of relieving himself of the liability to pay costs which he ought not to have been ordered to pay. The order might have been made a rule of Court without any affidavit, at the expense of the party making it so: but, to make the other side pay the costs, he has chosen to swear that it had been disobeyed. That, however, he did at his

(*a*) Reg. Gen., 27th of May, 1840. "It is resolved by all the Judges that, when a Judge's order is made a rule of Court, it shall be a part of the rule of Court that the cost of making the order a rule of Court shall be paid by the party against whom the order is made, provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed." 12 A. & E. 1; 1 M. & G. 278; 6 M. & W. 603.

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own risk; and as it turns out that he was mistaken, and that the order was not disobeyed, that part of the rule which imposes the costs of drawing it up on the other side must be set aside, and at his expense.

Rule absolute (*a*).

(*a*) See *Thompson* v. *Billing*, 11 M. & W. 361; S. C. 2 Dowl. N. S. 824; and *Black* v. *Lowe*, 4 D. & L. 285, overruling *Spicer* v. *Bond*, 2 Dowl. N. S. 955.

May 8.

Ex parte CRAWSHAW BAILEY.

Coram *Wightman, J.*

A variance in the descriptions of hereditaments in the notice to treat and in the precept to the sheriff, under the 8 & 9 Vict. c. 18, is an irregularity merely, and is waived by appearing before the jury summoned to assess compensation, and, after the objection taken and overruled, proceeding in the trial.

SIR *A. J. E. COCKBURN* moved for a certiorari to bring up and quash an inquisition held before the sheriff of Glamorganshire, to assess the value of certain lands belonging to Mr. Bailey, and which the Taaf Valley Railway Company required for the purposes of their railway. The parcels of land which the company had demanded by the notice to treat were described in that document as numbers 160 and 171 on the map deposited with the clerk of the peace, and as coloured in certain colours on a map at the office of the company at Cardiff. In the precept to the sheriff to summon a jury, the parcels claimed were described as 164, 166, and 181. This discrepancy was made a ground of objection at the trial on behalf of Mr. Bailey, but the objection was overruled. The trial then proceeded; Mr. Bailey's counsel did not withdraw, but conducted his case in the usual way, and the jury assessed the amount of compensation to which he was entitled.

Sir *A. J. E. Cockburn* now contended that the variance between the notice and the precept was fatal to the validity of the inquisition; and cited the dictum of Lord

Cottenham in *Stone* v. *The Commercial Railway Company* (*a*), that "the proceeding before the jury must be consistent with the precept, and the precept must be consistent with the notice."

WIGHTMAN, J.—Mr. Bailey appeared before the sheriff and took his chance of getting a verdict which would suit him. He knew then what were the lands which the company required; or if he did not, he should not have appeared. He was in the same situation as a defendant, who, having received no notice of trial, appears and protests, but nevertheless goes on. If he had got such a verdict as he liked, he would not have applied to the Court, and the company could not. He waived the objection by proceeding, and he cannot now complain.

Sir *A. J. E. Cockburn.* If an inferior court has acted irregularly, this Court will interfere.

WIGHTMAN, J.—Unless the irregularity has been waived.

Rule refused.

(*a*) 4 Myl. & Cr. 122, 126.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Trinity Term.

IN THE FIFTEENTH YEAR OF THE REIGN OF VICTORIA.

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The Judge who usually sat in the Bail Court in this Term, was WIGHTMAN, J.

May 27.

REGINA on the Prosecution of WILLIAM MAJOR and Others *v.* THOMAS MAJOR.

Coram *Wightman, J.*

The defendant having committed perjury upon a reference to a Master in Chancery to ascertain the amount of A.'s estate, in a suit brought by A.'s executors, was prosecuted by the executors, and convicted. *Held*, that they were entitled to costs as parties "grieved or injured," within the meaning of 5 & 6 Wm. & M. c. 11, s. 3.

WILLES moved for a rule, calling on the prosecutors to shew cause why a side-bar rule ordering the Coroner and Master of this Court to tax the prosecutors' costs, should not be rescinded.

The prosecutors, who were executors under a will, had instituted a suit in equity, in the course of which it was referred to the Master to ascertain the amount of the testator's estate. A state of facts was carried in before him, shewing that the defendant was indebted to the estate; and the defendant having made an affidavit denying his liability, the present indictment for perjury was preferred against him at the Central Criminal Court, and was afterwards

removed, at his instance, into this Court by certiorari. He was convicted and sentenced to imprisonment. The prosecutors afterwards obtained the usual side-bar rule to tax their costs; but it having been objected before the Master that the prosecutors were not parties "grieved or injured" within the 5 & 6 Wm. & M. c. 11, s. 3, and therefore not entitled to costs, he deferred the taxation, in order that the defendant might make the present application. The affidavit in support of the motion stated that the prosecutors were not interested in the subject-matter of the suit in equity.

Willes. The prosecutors were not parties "grieved or injured" within the 5 & 6 Wm. & M. c. 11, s. 3, which enacts, that if the defendant prosecuting the writ of certiorari be convicted of the offence for which he is indicted, this Court shall give costs to the prosecutor, "if he be the party grieved or injured, or be a justice of the peace," &c. In order to entitle a prosecutor to costs under this section, the act done, which is the subject of the indictment, must be something to his actual damage, or for which he might maintain an action. [*Wightman*, J.—I do not agree with you in that interpretation. I think it is sufficient if the act complained of is an injury as far as it goes, and might have accomplished the object which the defendant intended it should.] In *Rex* v. *Ingleton* (*a*), the indictment charged the defendant with attempting to set fire to a house, and with soliciting one of the prosecutors to assist him in so doing; and it was held that the prosecutors were not parties grieved under the above section, "for there was no damage done to the house," "nor are either of them officers." That case shews that there must be some actual damage arising from the act which is the subject-matter of the indictment. [*Wightman*, J.—Suppose a person makes a false affidavit in answer to one in support of a rule, but notwithstanding, the truth appearing on other affidavits,

(*a*) 1 Wils. 139.

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the rule is made absolute, would there be no right to costs if the person were indicted and convicted, because the perjury was not successful?] It may be a question whether the injury or grievance must not, in all cases, be one for which an action can be maintained. At any rate, *Rex* v. *Ingleton* (*a*) is in point, and ought to govern the present.

WIGHTMAN, J.—In the case cited the offence was not completed, and the prosecutor could scarcely be said to be grieved or injured by merely being solicited to commit an offence, with which solicitation he did not comply. Here the false swearing was an obstruction in the prosecutor's way, which they were obliged to take steps to remove. I think that a person is injured by having a difficulty interposed which he is obliged to overcome, and that it is not less an injury because he may succeed in overcoming it.

Rule refused.

(*a*) 1 Wils. 139.

May 8, *June* 2.

REGINA *v.* THE JUSTICES OF SURREY.

Coram *Wightman, J.*

A highway being out of repair, the surveyor was summoned before the special sessions for highways, and having denied the liability of the parish to repair, the sessions ordered, under the 95th section of the 5 & 6 Wm. 4, c. 50, that the parish should be indicted at the next quarter sessions. An indictment was preferred accordingly; but the trial was adjourned to a subsequent sessions. The parish pleaded to the indictment the liability of C. to repair, ratione tenuræ, of certain lands; and the jury found a verdict for the defendants. The lands were the property of one of the magistrates who had signed the order to indict the parish. There was no evidence of collusion between him and the prosecutor.

The quarter sessions having refused to order the costs of the indictment out of the highway rate, on the ground that the order to indict was void, as one of the justices making it was a party interested:

Held, upon motion for a mandamus to compel them to make such order,

1. That the order to indict was valid;

2. That the quarter sessions had jurisdiction to order costs, notwithstanding the adjournment of the trial. And

3. That the quarter sessions had no discretion to refuse costs.

THIS was a rule calling on the justices of Surrey to shew cause why a mandamus should not issue, commanding them to direct that the costs of the prosecution of an indictment

against the parish of Abinger should be paid out of the highway rate of that parish.

The following facts appeared on the affidavits. A road in the parish of Abinger being out of repair, a summons was, upon the information of a Mr. Gates, a resident and occupier of land in the parish, issued against the surveyor of highways, requiring him to appear at the next special sessions for highways. He appeared accordingly on the 2nd of July, 1851; and having denied the duty or obligation of the inhabitants of Abinger to repair the highway in question, the justices, among whom was Mr. Lee Steere, made an order under the 5 & 6 Wm. 4, c. 50, s. 95, that an indictment should be preferred against the parish at the next general quarter sessions for the county. This was done accordingly, and the defendants pleaded the liability of John Charman to repair the road in question, by reason of his tenure of certain lands and tenements called Abraham's Farm. The indictment was preferred at the Michaelmas Quarter Sessions, 1851, but the trial was adjourned, and did not come on until the Easter Quarter Sessions in this year. Upon the trial, it appeared that the lands in respect of which Charman was alleged to be liable were the property of Mr. Lee Steere, whose tenant Charman was; and the counsel for the prosecution, near whom Mr. Steere sat during the trial, giving him instructions, in addressing the jury dwelt upon the hardship which would be inflicted on Mr. Steere, if the plea, which he represented as mainly directed against that gentleman, were held to be proved. The jury found a verdict for the defendants. The counsel for the prosecution thereupon applied to the justices to direct the payment of Mr. Gates' costs out of the highway rate, in pursuance of the 5 & 6 Wm. 4, c. 50, s. 95; but they declined, on the ground that the order for preferring the indictment was invalid, having been signed by a magistrate who was interested in the matter respecting which it was made. It was stated, among other things, upon the affidavits in answer, that Mr. Steere had not for three years previously attended the sessions at which this

order was made. It also appeared that Gates had, some months before applying for a summons against the surveyor, complained to one James Muggridge, who was then the tenant of Abraham's Farm, and who had held it for 17 or 18 years immediately before Charman became tenant of it, that the road was out of repair, and said that he would have it repaired; that Muggridge told him that the parish had done no repairs to the road, but that he, Muggridge, had, during his tenancy, repaired it; upon which Gates said that he would indict the road, and find out to whom it belonged; that the tenant thereupon afterwards did some repairs in Gates' presence; but the road again getting out of repair, Gates took the proceedings above mentioned.

Pashley and *B. C. Robinson* shewed cause. The order for indicting the parish was void; for it was signed by a magistrate interested in the subject-matter, and, if void, the quarter sessions had no power to order costs; *Reg.* v. *Martin* (*a*). [*Wightman*, J.—Would the order have been void if Mr. Steere had been, not the owner of the land in respect of which the liability to repair existed, but owner of other land in the parish?] It would have been bad on the same ground that an order of removal made by a justice who was a rated inhabitant of the removing parish was void, before the 16 Geo. 2, c. 18 (*b*), viz., that any act of a magistrate by which the rates to which he contributes are increased or diminished, is void. *Reg.* v. *The Cheltenham Commissioners* (*c*), and *Reg.* v. *The Justices of Hertfordshire* (*d*), are two recent illustrations of the general rule (*e*). [*Wightman*, J.—Is the prosecutor to be deprived of his costs because one of the magistrates who signs the order happens to be the owner of an acre of land in the parish?] It may be a hardship, but the rule is inflexible: an order

(*a*) 2 Q. B. 1037, n. (*a*).

(*b*) See *Rex* v. *Great Chart*, Burr. Sett. Ca. 194; S. C. 2 Stra. 1173.

(*c*) 1 Q. B. 467.

(*d*) 6 Q. B. 753.

(*e*) See also *Dimes* v. *The Grand Junction Canal Company*, 3 H. L. Ca., 29th of June, 1852.

so signed is void, and without an order the quarter sessions cannot give costs. [*Wightman*, J.—Whom, then, ought Gates to have indicted?] The occupier of the lands; who was bound to repair ratione tenuræ. [*Wightman*, J.—Why was he bound to incur the risk of indicting a person who might not be liable, instead of relying on the common law liability of the parish? Suppose the surveyor had objected at the special sessions that Mr. Steere was bound to repair the road, had not Gates a right to say: I doubt that, I wish to indict the parish, and I demand that the justices shall make an order for that purpose?] Admitting that he had, it was nevertheless necessary to the validity of the order that the magistrates making it should have no interest. [*Wightman*, J.—That would depend upon whether they had a discretion. The act says (*a*), that "it shall then be lawful for such justices, and they are hereby required to direct a bill of indictment to be preferred." Is not that imperative? Is not their duty ministerial rather than judicial?] It has been held that the special sessions have a discretion under those words. Thus, in *Reg.* v. *The Inhabitants of Chedworth* (*b*), it was held by *Patteson*, J., that they had a discretion in deciding whether the road was a highway or not. "I am not satisfied," said the learned Judge, "as to what the construction of this act ought to be; the words are very strong, and seem to be difficult to be got over; but to construe them as imperative will lead to great absurdity. With respect to the order I am inclined to think, that when the justices had the case before them they might make any order respecting it which they thought fit." And this decision was approved of by the Court of Queen's Bench in *Reg.* v. *The Inhabitants of Heanor* (*c*). [*Wightman*, J.—If it were shewn that there was collusion between Gates and Steere, there might be ground for contending that the order was void.] [The facts were then commented upon with the view of shewing the existence of such collusion.]

(*a*) Sect. 95.
(*b*) 9 C. & P. 255, 286.
(*c*) 6 Q. B. 745.

Next, whether the order was valid or not, was a question for the decision of the quarter sessions, and this Court cannot reverse or inquire into the grounds of their judgment. If the order had been signed by one justice alone, the quarter sessions must, upon its production, have decided whether it was valid or not; and they were equally bound to enter upon the consideration of its validity in the present case.

But even if the order were valid, the Court which tried the indictment had no power to give costs. The order to indict, under the 95th section of the Highway Act, directs that the indictment shall be preferred at the next general quarter sessions; and that section enacts, that the costs of the prosecution shall be given by the justices "at such"—that is, "at the next"—quarter sessions. Here, however, the Easter Quarter Sessions were not the next; and they, therefore, derive no power from the act to order costs. In *Reg.* v. *Belton* (*a*) it was held, that the sessions had no power to adjourn an appeal under the Victuallers' Licensing Act (9 Geo. 4, c. 61), the 27th section of which enacts, that parties aggrieved may appeal to "the next" sessions, and that "the Court at such session shall hear and determine the matter of such appeal." It will be contended that the Court had power to adjourn the trial under the 14 & 15 Vict. c. 100, s. 27, which enacts, that "if the Court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such Court may adjourn the trial of such person to the next subsequent session," &c.; but the enactment does not extend to parishes or corporate bodies. [*Wightman*, J. —If your argument be well founded, the trial, verdict and judgment are void.] It is not necessary to carry the argument so far. The case of *Reg.* v. *Belton* is precisely in point. [*Wightman*, J.—But it turned upon a different enactment. I have a great distrust of analogous cases; omne simile non est idem. I must give a reasonable con-

(*a*) 11 Q. B. 379.

struction to the act; and I cannot suppose that it was intended that the costs should be ordered before the indictment was tried.]

J. Pitt Taylor and *Sumner*, in support of the rule. The order to indict was valid. There is no evidence that Mr. Steere was interested at the time when it was made. The surveyor did not contend at the special sessions that Mr. Steere or any other person was bound to repair the road; he simply stated that the parish was not liable,—a statement which might have been established by shewing that the road was not a highway, or that it was not out of repair. It was not until plea pleaded that Mr. Steere became interested: and then he became interested only because the verdict of the jury would be evidence of reputation that his property was liable to keep the road in repair.

But even if he were interested at the time when the order was made, it is nevertheless valid; for it was a ministerial, not a judicial, act. The 94th section of the Highway Act authorizes summary proceedings before the special sessions for highways against the surveyor of the parish when any highway is out of repair: but it provides that the sessions shall not have power to interfere "where the duty or obligation of repairing the said highway comes in question." The 95th section enacts, that "if on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred" "at the next general quarter sessions" "against the inhabitants of the parish or the party to be named in such order," &c.;—that is, reddendo singula singulis, against the inhabitants, if the surveyor be summoned, and against any other party, if any such other be summoned. The special sessions have

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no power to take evidence: upon the bare denial of liability they are bound to make the order. Their power is analogous to that which is given by the 12 & 13 Vict. c. 106, to the commissioners of bankruptcy respecting the granting or withholding protection in the cases enumerated in the 256th section of the act, which enacts that in those cases "the Court shall refuse" protection. "The discretion vested in the commissioners by the act," says the Lord Chancellor, in *Ex parte Stanton* (*a*), "in granting or withholding protection, is very large, except in the particular instances mentioned in the 256th section, when his discretion ceases, and he only acts in a ministerial character, which renders it incumbent on him to refuse protection."

If the order to indict was valid, the quarter sessions had no discretion in giving or refusing costs, but were bound to order that they should be paid out of the highway rate. The cases of *Reg.* v. *The Inhabitants of Chedworth* (*b*), and *Reg.* v. *The Inhabitants of Heanor* (*c*), cited on the other side, have no bearing on the question; for they did not turn upon the 95th section. Here, however, if the order to indict the road was valid, the case clearly falls within that section; and *Reg.* v. *The Inhabitants of Yarkhill* (*d*), establishes, that in such a case the Court which tries the indictment is bound to order costs. That case was decided by *Williams*, J., after consulting the other Judges; and Lord *Denman* gave the statute the same construction in a case at the Sussex Assizes, referred to by his Lordship in *Reg.* v. *Pembridge* (*e*).

Cur. adv. vult.

WIGHTMAN, J., now (June 2) delivered judgment.—This was a rule for a mandamus to the justices of Surrey, to allow the costs of the prosecution of an indictment

(*a*) December 20, 1851. Cited from 21 Law Journ. Ca. in Bankruptcy, 7, 11.

(*b*) 9 C. & P. 285.

(*c*) 6 Q. B. 745.

(*d*) 9 C. & P. 218.

(*e*) 3 Q. B. 903.

against the inhabitants of the parish of Abinger for non repair of a highway.

The indictment had been preferred on the prosecution of Richard Gates, at the quarter sessions, by the order of three justices at a special sessions for highways, under the 94th and 95th sections of the 5 & 6 Wm. 4, c. 50. The parish pleaded that one John Charman was liable to repair the highway as occupier of a farm called Abraham's Farm, ratione tenuræ; and upon the trial a verdict was found for the parish. The prosecutor applied for his costs under the 95th section, which were refused, on the ground that one of the three magistrates who made the order for preferring the indictment was the landlord of Abraham's Farm, and so interested in the matter in respect of which he made the order.

There was no doubt but that Mr. Lee Steere, one of the justices who made the order, was the landlord of Abraham's Farm, and it appeared by the affidavits, that at the trial of the indictment he sat by the counsel for the prosecution and assisted him; and there can be no doubt that when the parish sought to excuse themselves from the repair of the highway by alleging the liability of the tenant of Abraham's Farm, Mr. Lee Steere was interested in the result, as the farm would be deteriorated in value if it were charged with the repair of the highway.

The question, however, is, not whether he was interested in the issue raised by the plea, but whether he had such an interest at the time when the order was made as would disqualify him from acting; or, if he had any interest, it was such as would have influenced either his own conduct, or have enabled him to influence the conduct of the other magistrates who acted with him.

There does not appear upon the affidavits any sufficient ground for imputing collusion between Gates, the prosecutor, and Mr. Steere previously to or at the time of obtaining the order. Gates, indeed, appears to have been a bonâ fide prosecutor, and to have cared little who was liable to repair,

provided the road was made good. It appears that he had complained to a previous tenant of Abraham's Farm, a few months before going before the justices, of the road being out of repair, and said that he would have it repaired, and that upon the tenants saying that the parish had done no repairs to the road, but that he, the tenant, had done them during his tenancy (which was seventeen years), Gates said that he should indict the road, and find out to whom it did belong; that the tenant did some repairs to the road after this in the presence of Gates himself, but the road still continuing out of repair, he summoned the surveyor of the parish under the 94th section of the act, to appear before the justices at the special sessions for highways.

The surveyor of the parish accordingly attended at the special sessions which were holden before three justices, of whom one was Mr. Steere, and no question was made that the way was a highway, and that it was out of repair; but the surveyor alleged that the parish were not bound to repair the road, but did not state or suggest who ought to do so, or that any other person or persons was or were liable to repair it. The three magistrates, including Mr. Steere, then made the order for preferring an indictment against the parish.

The first and most important question is, could the magistrates have done otherwise, as the case appeared before them, than make the order? The statute, in the 94th and 95th sections, provides that if a highway be out of repair, and information on oath be given to a justice, he may issue a summons to the surveyor of the parish, or other person chargeable with the repairs, to appear before the justices at a special sessions for the highways; and if, upon the hearing of the summons, the obligation to repair be denied by the surveyor on behalf of the inhabitants, or by any other party charged therewith, it is lawful for the justices, and they are thereby required to direct an indictment against the inhabitants of the parish or the party to be named in such order, and the costs of such prosecution

shall be directed by the justices at the quarter sessions, if the indictment be tried before them, to be paid out of the rate made in pursuance of the act, in the parish in which the highway is situate.

The parish is, in every case, primâ facie liable to the repair of the highways within it; and though Gates might have been told that the tenant of Abraham's Farm usually repaired the highway in question, he would be well warranted in summoning the persons primâ facie liable, namely, the parish, by means of the surveyor, and leaving them to discharge the parish if they could, by shewing a liability in some other person; but it was not suggested on the part of the parish that the tenant of Abraham's Farm, or any other person than the parish, was liable. It was not made a question whether the parish or somebody else was liable, and as the statute is in terms imperative, I do not see how the justices could do otherwise than make the order, nor how any interest that Mr. Steere might have in the question that the parish *afterwards* raised, could influence or affect the making the order. As the case stood at the time when the order was made, I am at some loss to discover such an interest in Mr. Steere as would make the order bad, because be joined in it. If the affidavits shewed that the summons was taken out and the indictment preferred at his instigation, and that Gates was not a real prosecutor, but colluding with Steere, the case would assume a very different character; but Gates appears, as far as I can judge from the affidavits, to have been a bonâ fide prosecutor, and it would certainly be hard upon him that he should lose his costs, because the order,—which the magistrates could not refuse as the case stood,—was signed by one who had an interest in the question which was subsequently raised, but which was not raised when the order was made. If it had been suggested to the justices that the tenant of Abraham's Farm was liable, and the question had been whether he or the parish should be indicted, and Mr. Steere had joined in an order to indict the parish, I should

certainly have thought the order void on that ground; but no such suggestion was made, and the justices could only order the indictment against the parish. The question is not whether the parish or Mr. Steere shall pay the costs,—for he cannot be liable to pay them in any view of the case,—but whether Gates shall lose them, because Steere, over whom he had no control, joined in making the order.

I entirely concur in all the decisions, that if any part be taken in a judicial act by a person who is interested in it, such act is void; but it seems to me, that in making the order in question, the magistrates were not called upon to exercise any judgment, and that, as the case was presented to them, they could only make the same order, whether Mr. Steere was landlord of Abraham's Farm or not, and that that circumstance was not material, and could have no influence in making the order.

It appears to me upon the whole, that the order is not void, for the reasons I have mentioned; and that as no collusion is shewn between Gates and Steere in obtaining the order, and as Gates appears to have been a bonâ fide prosecutor, he ought to have had his costs,—it being imperative upon the Court of Quarter Sessions to grant them, unless the order or the conduct of the prosecutor can be impeached.

I am the more disposed to make the rule absolute, as I do not conclude the parties by doing so, though I should, if I refused it. A return may be made to the mandamus if the parish or the magistrates be dissatisfied with my opinion, or wish to add further facts, which may alter the view which I have taken of the case. The rule, therefore, will be absolute.

Rule absolute.

CLARKE and Another *v.* The GUARDIANS of the Poor of The CUCKFIELD UNION, SUSSEX.

May 12, 1851.
June 12, 1852.

Coram *Wightman, J.*

The plaintiffs, in pursuance of a verbal contract entered into with the guardians of the C. Union at a properly constituted meeting of their board, supplied waterclosets to the C. Workhouse: *Held*, that the guardians were liable in indebitatus assumpsit for their price, although the contract was not under seal.

THIS was an action of indebitatus assumpsit for goods sold, work done, and materials provided, with the common money counts; to which the defendants pleaded the general issue. At the trial, which took place before the undersheriff of Middlesex, on the 1st of May, 1851, the following facts appeared. The plaintiffs were the patentees of a new description of water-closet; and the defendants, as the guardians of the Cuckfield Union, verbally contracted with them for the supply of water-closets to the workhouse. The contract was entered into at a meeting of the board of guardians, which was properly constituted; and the water-closets were duly affixed to, and were at the time of action brought and of the trial in the workhouse. The amount sought to be recovered was 12*l.* 15*s.*, being the balance of an original claim of about 80*l.* The defendants, besides other grounds of defence not material to this report, objected that the contract was not binding on them, not being under the corporate seal. The undersheriff directed the jury, if they were of opinion that the contract was proved to have been in fact entered into, to find a verdict for the plaintiffs for the amount claimed; reserving leave to the defendants to move to enter a nonsuit. The jury having accordingly found a verdict for the plaintiffs, a rule nisi was afterwards obtained to set it aside, and to enter a nonsuit; against which,

Welsby and *Pigott* shewed cause (*a*). The plaintiffs were

(*a*) In Easter Term (12th of May), 1851.

entitled to recover, although the contract was not under seal. The general rule, no doubt, is, that a corporation aggregate is not bound by a contract, unless it be under seal. But to this rule there are, among others, the following exceptions. First, where the subject-matter of the contract is of an ordinary and insignificant nature; and secondly, where the contract is necessarily incident to the purposes for which the corporation was created. In *Paine* v. *The Strand Union* (*a*), the latter exception was recognised; although the contract being for a survey or map of the rateable property in one parish of the union, the Court was of opinion that it did not, in point of fact, come within the scope of the exception. The case of *Sanders* v. *The St. Neot's Union* (*b*) is, however, expressly in point. There it was held, that a contract to supply iron gates to a workhouse having been entered into with the guardians, and the gates having been erected and completed, the guardians could not, after adopting the work, object that the contract was not under seal. *The Governor and Company of Copper Miners* v. *Fox and Others* (*c*); *De Grave* v. *The Mayor, &c. of Monmouth* (*d*); *Beverley* v. *The Lincoln Gas Light and Coke Company* (*e*); *Church* v. *The Imperial Gas Light and Coke Company* (*f*); and *Hall* v. *Mayor, &c. of Swansea* (*g*), are also authorities in favour of the plaintiffs. There is no sound distinction, as regards this exception, between the case of a trading corporation and one of the kind now under consideration. The stat. 5 & 6 Wm. 4, c. 69, s. 7, which makes the guardians of the poor of every union a corporation, enacts, that "as such corporation the said guardians are hereby empowered to accept, take, and hold, for the benefit

(*a*) 8 Q. B. 326.
(*b*) Id. 810.
(*c*) Q. B., Hil. Term, 1851, cited from 20 Law Journ, Q B. 174.
(*d*) 4 C. & P. 111.
(*e*) 6 A. & E. 829; S. C. 2 N. & P. 283.
(*f*) Id. 846; S. C. 3 N. & P. 35.
(*g*) 5 Q. B. 526.

of such union or parish, any buildings, lands, or hereditaments, goods, effects," &c., "and they are further empowered by that name to bring actions, and to sue and be sued, and to take or resist all other proceedings for or in relation to any such property," &c. The effect of that and the former act, 4 & 5 Wm. 4, c. 76, s. 38, is to vest in the guardians of the union the property in, and the management of, the workhouse of the union. Here the contract sought to be enforced is for the price of chattels which have been affixed to and form part of the workhouse.

Hance, in support of the rule. The cases establish a wide distinction between trading and other corporations with regard to their power to bind themselves by contracts not under seal. That distinction is pointed out and recognised in *The Mayor of Ludlow* v. *Charlton* (*a*). Here the subject-matter of the contract cannot be said to relate to the purpose for which the corporation was created, as the power to draw bills is, in the case of a trading corporation. The present case is distinguishable on this ground from many of those cited on behalf of the plaintiffs. In *Lamprell* v. *The Billericay Union* (*b*), the contract sought to be enforced was for building a poor house, and it was held that as the defendants were a corporation, the contract was void, unless it was under seal. The Court of Exchequer in giving judgment there say, "The defendants are a corporate body incapable of contracting otherwise than by deed. We adhere, on this subject, to the doctrine laid down by this Court, in *The Mayor of Ludlow* v. *Charlton*, and subsequently acted on in the Common Pleas in *Arnold* v. *The Mayor of Poole* (*c*), and by the Court of Queen's Bench, in *Paine* v. *The Strand Union*. The

(*a*) 6 M. & W. 815.
(*b*) 3 Exch. 283, 306.
(*c*) 4 M. & G. 860; S. C. 5 Scott, N. R. 741; 2 Dowl. N. S. 574.

principle of those cases clearly exempts the present defendants from all liability as to the matters in question in this action, except such as arose by instrument under their seal." If that case is rightly decided, it must, in principle, govern the present. The case of *Sanders* v. *The St. Neot's Union* (*a*) is very briefly reported; none of the cases appear to have been referred to; and the decision seems to have been questioned by the Court of Exchequer in *Lamprell* v. *The Billericay Union* (*b*). In a more recent case in that Court, *Diggle* v. *The London and Blackwall Railway Company* (*c*), all the authorities were fully discussed and reviewed. The action was for work done in altering and re-laying the permanent way on the defendants' line of railway, and *Pollock*, C. B., in delivering judgment, says, "The defendants resist this action on the ground that the contract on which it is founded ought to have been made under seal. On the other hand, the plaintiff alleges that the work which he has contracted to do is actually executed, and that it was necessary for the purposes of the company; and that these two circumstances constitute a distinction between the old law and that which now prevails." "My judgment, however, proceeds on the ground that there was no contract under seal." "Without doubt a corporation is not bound to do every thing by deed, for where convenience requires that an act should be done expeditiously, or where some instant assistance may become necessary, and the seal cannot be affixed or a meeting of the directors be called, in such cases the use of the seal may be dispensed with." The judgment of the rest of the Court is to the same effect. If it were not necessary that the contract should be under seal, in a case like the present, it is difficult to conceive one in which it would be.

Cur. adv. vult.

(*a*) 8 Q. B. 810.
(*b*) 3 Exch. 283.
(*c*) Since reported, 5 Exch. 442. Cited from 19 Law Journ., Exch. 308, 310.

WIGHTMAN, J., in the present Term (June 12), delivered judgment.

I have deferred giving judgment in this case which was argued before me some time ago, in the hope that the action, which was for the sum of 12*l.* 15*s.* only, would have been settled, the importance of the question raised being out of all proportion to the amount in difference between the parties.

[His Lordship, after stating the facts of the case, proceeded as follows:]—The only question for the consideration of the Court is, whether,—assuming that the supply of the articles was such as was proper and needful for the workhouse, and that the defendants ordered them at the meeting of the board to be furnished by the plaintiffs, and afterwards approved of and kept them, and that if they had not been a corporation they would have been liable to pay for them,—the guardians of the poor, being a corporation, and sued as such, are liable, unless they contracted under seal with the plaintiffs.

The injustice of allowing the defendants to have the benefit of the work done by the plaintiffs without paying for it, makes it the more necessary to inquire strictly whether the general rule of law applies to this case, or whether it falls within any exception which may enable the plaintiffs to recover.

It is, no doubt, a rule of law, that a corporation aggregate can only contract under seal. So much inconvenience, however, arises from the strict application of the rule, that it was in very early times relaxed with respect to small matters of frequent and ordinary occurrence. The instances are mentioned in *Bac. Abr.*, tit. "*Corporations*," (E.); *Com. Dig.*, tit. "*Franchises*," (F. 12, 13). This relaxation of the rule has been gradually extended, and it may now be considered that the general rule, that a corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts

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is necessary and incidental to the purposes for which the corporation was created.

In most of the earlier of the modern cases, the corporations have been plaintiffs; but those cases were decided upon grounds which would be equally applicable had the actions been against them.

In the case of *The City of London Gas Light and Coke Company* v. *Nicholls* (*a*), *Best*, C. J., held that indebitatus assumpsit might be maintained by the company for gas supplied, observing that it was quite absurd to say that there was any necessity for a contract by deed in such a case. The case of *The Mayor of Stafford* v. *Till* (*b*), and the judgment of the Court in the subsequent case of *The East London Waterworks Company* v. *Bailey* (*c*), are direct authorities that corporations may be parties to contracts not under seal. In the latter case, *Best*, C. J., took a distinction between executory and executed contracts (which has not, however, been recognised in subsequent cases), considering that if the contract were executed, the law would imply a promise, and no deed was necessary, as was decided in the case of *The Mayor of Stafford* v. *Till*.

The power of a corporation for a particular purpose, to maintain an action of assumpsit for breach of an executory contract connected with the purpose for which the company was constituted, was elaborately argued and deliberately determined in the case of *Church* v. *The Imperial Gas Light and Coke Company* (*d*). In that case the company had brought an action against Church upon an executory contract by them to supply gas, which Church had refused to accept. In giving the judgment of the Court, Lord *Denman* assumes it to be established, that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, amongst

(*a*) 2 C. & P. 365.
(*b*) 4 Bing. 75.
(*c*) 4 Bing. 283, 287.
(*d*) 6 A. & E. 846.

which are included such as relate to the supply of articles essential to the purposes for which it is created: and he then considers that there is no sound distinction to be taken in respect of such contracts, between those that are executed and those that are executory. In repudiating this distinction, the Court of Queen's Bench differed from the judgment of the Court of Common Pleas in the case of *The East London Waterworks Company* v. *Bailey*, but in other respects they agreed in that decision. The case of *Beverley* v. *The Lincoln Gas Light and Coke Company* (*a*), decided about the same time, is more directly in point, as the action in that case was indebitatus assumpsit for goods sold and delivered against the company. The action was for the price of gas meters supplied by the plaintiff to the company under a parol contract. All the previous cases were considered by the Court of Queen's Bench in an elaborate judgment for the plaintiff, in which it was decided that the action was maintainable, and the company liable, though there was no contract by deed.

In *The Mayor of Ludlow* v. *Charlton* (*b*), decided subsequently to the cases of *Beverley* v. *The Lincoln Gas Light and Coke Company*, and *Church* v. *The Imperial Gas Light and Coke Company*, the Court of Exchequer held that a municipal corporation cannot contract to pay money out of the corporation funds for improvements in the borough except under seal, on the ground that such a contract was not within any of the exceptions to the general rule, nor of ordinary occurrence, nor directly necessary for the purposes for which the corporation was instituted.

Upon the same ground, the Court of Queen's Bench held, in the subsequent case of *Paine* v. *The Strand Union* (*c*), that the plaintiff, who brought an action of assumpsit for work and labour against the guardians of the poor of the

(*a*) 6 A. & E. 829.
(*b*) 6 M. & W. 815.
(*c*) 8 Q. B. 326.

Strand Union to recover a demand for making a plan of one of the parishes in the union by direction of the board of guardians, but without any contract under seal, was not entitled to enforce such demand, as the making the plan of a particular parish was not necessary for the guardians of the union generally, nor incidental to the purposes for which they were incorporated. But in the subsequent case of *Sanders* v. *The St. Neot's Union* (*a*), the Court held, that an action of assumpsit for goods sold and work and labour was maintainable in respect of a demand by the plaintiff for iron gates supplied to the workhouse by the direction of the guardians, and erected there under a verbal order; and in giving judgment Lord *Denman* observes, that the defendants could not be permitted to take the objection that there was no contract under seal, if the work, when done, was adopted by them for purposes connected with the corporation. In the late case of *The Governor and Company of Copper Miners* v. *Fox and Others* (*b*), it was held that the company could not maintain an action on an executory parol contract relating to the furnishing of *iron* rails, on the ground that the contract was not incidental or ancillary to carrying on the business of *copper* mines, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed. In giving judgment Lord *Campbell* observed: "had the subject-matter of this contract been copper, or if it had been shewn in any way to be incidental or ancillary to carrying on the business of copper miners, the contract would have been binding, although not under seal; for where a trading company is created by charter, while acting within the scope of the charter it may enter into the commercial contracts usual in such a business in the usual manner."

The result of the cases to which I have referred appears

(*a*) 8 Q. B. 810.

(*b*) 20 Law Journ., Q. B. 174. Q. B., Hil. Term, 1851.

to be, that wherever a corporation is created for particular purposes, which involve the necessity of frequently entering into contracts, for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation, and of which they have had the full benefit, may be enforced by action of assumpsit; and the corporation will be liable though the contract was by parol only, and not by deed.

There is, however, a case decided by the Court of Exchequer upon deliberate consideration, which I find it very difficult to reconcile with many of the authorities to which I have referred; I allude to the case of *Lamprell* v. *The Billericay Union* (*a*). That was an action of covenant against the guardians of the union to recover the price to be paid according to a deed for work done under a specification in building a workhouse, and for extra work. The deed provided that no extra work should be allowed for, unless done by the direction in writing of certain surveyors named in the deed. Much extra work was done under the direction of, and adopted by the defendants and their surveyor; but no written directions were given, and the extra work could not be recovered under the deed. The defendants had made many payments on account generally, in the progress of the work, and the plaintiff proposed to appropriate those payments to the discharge of his claim for extra work, and it was upon the appropriation of payments that the question arose. The Court considered that, to entitle the plaintiff to appropriate the payments, he must shew that there were two debts: one under the deed, and the other under a parol contract for payment for the extra work, to be implied from its being done with the assent of the defendants, and from their having adopted and taken the benefit of it; but the Court held, that no such contract

(*a*) 3 Exch. 283.

could be implied in this case, as the defendants were a corporation and incapable of making such a contract as that for the extra work by parol. The Court considered, that notwithstanding the nature of the corporation, and the purposes for which it existed, it was incapable of contracting otherwise than by deed, even for such purposes as those in question, which were absolutely necessary for carrying into effect the objects of the corporation.

The ground upon which a seal is required to authenticate the acts of corporations is stated in the case of *The Mayor of Ludlow* v. *Charlton* (*a*): it is required as indicating the concurrence of the whole body corporate. "The seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else."

This, no doubt, is strictly applicable to municipal corporations and others of a similar character; but not so clearly to such a corporation as the guardians of an union. By the 4 & 5 Wm. 4, c. 76, s. 21, 23, and 38, guardians of an union have the government of the workhouse; and there is a general provision, that no acts of the guardians shall be valid except at a board when three are present, and concur. By the 5 & 6 Wm. 4, c. 69, s. 7, "for the more easy execution of that act, and of the laws relating to the poor," the guardians of the poor of every union are made a corporation, and may use a common seal. There is, however, no alteration in the law as to the power of the guardians at a board of not less than three. A board of three guardians only would have power, both before and after the guardians were made a corporation, to do all such acts as the whole body might do; and, before they were a corporation, might make all such contracts by parol as were necessary for the purpose of exercising the powers given to

(*a*) 6 M. & W. 823.

them by the statutes; but after they were made a corporation "for the more easy execution of the laws relating to the poor," it would seem from the case of *Lamprell* v. *The Billericay Union* (*a*) that they could do no act, except the most trivial, nor make any contract, except under seal.

That case was followed by two others in the same Court; that of *Diggle* v. *The London and Blackwall Railway Company* (*b*), and *Homersham* v. *The Wolverhampton Waterworks Company* (*c*). The case of *Diggle* v. *The London and Blackwall Railway Company*,—in which it was held that indebitatus assumpsit for work and labour, and materials, could not be maintained against a railway company upon a parol contract, though the demand was in respect of taking up old rails and substituting new ones,—was decided upon the same ground. In that case there was no contract, either under the seal of the company, or signed by three directors, as required by the company's act. In *Homersham* v. *The Wolverhampton Waterworks Company*, which was a case very similar to the last, the demand was for extra work under an implied contract; there being no express contract entered into by three directors, as required by 8 & 9 Vict. c. 16, s. 97.

These three cases, and especially that of *Lamprell* v. *The Billericay Union*, are undoubtedly adverse to the claim of the plaintiff in the present case; and I find it difficult to draw any substantial distinction between them, upon the point in question. I may, however, observe, that the Court of Exchequer in *Lamprell* v. *The Billericay Union*, refer to the cases of *The Mayor of Ludlow* v. *Charlton*, *Arnold* v. *The Mayor of Poole* (*d*), and *Paine* v. *The Strand Union* (*e*), as authorities upon which they rely for the principle of their decision, without adverting to that which seems, according to other authorities, an important and distinguishing cir-

(*a*) 3 Exch. 283. (Since reported, 6 Exch. 137).
(*b*) 19 Law Journ., Exch. 308. (*d*) 4 M. & G. 860.
(Since reported, 5 Exch. 442.) (*e*) 8 Q. B. 326.
(*c*) 20 Law Journ., Exch. 193.

cumstance in those cases; namely, that in none of them was the subject-matter of the contract necessary or essential to the very purposes for which the corporation was created; nor is the peculiarity of the constitution of such a corporation as the guardians of an union, the object of its creation, and the power of a quorum at a board meeting, adverted to. It may be further remarked, that the case of *Arnold* v. *The Mayor of Poole* (*a*), appears to be an authority against the decision in *Lamprell* v. *The Billericay Union* (*b*), upon the point of appropriation of the payments.

The reason for which a seal is required to authenticate the acts of a corporation, seems hardly to exist in much force in respect to the guardians of a poor law union, who, by the statute by which they were originally constituted, act by resolutions at a board composed of not less than three. In the present case, the work was ordered at a board of guardians regularly constituted; it was performed and adopted, and nothing remained but to pay for it. But the alleged contract under which it was done, though entered into by the proper authority, was verbal only.

I greatly regret the present state of the law upon a subject so important. It would perhaps have been better, and have avoided the uncertainty which now exists, if the old rule had never been relaxed; but the question is, whether, as the law now stands, the demand in question comes within any of the recognised exceptions to the general rule? I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect,—as in the case of the guardians of a poor law union,—and orders are given, at a board regularly constituted and having general authority to make contracts, for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods are supplied and accepted by the corporation, and the whole

(*a*) 4 M. & G. 860. (*b*) 3 Exch. 283.

consideration for payment is executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal is wanting, and therefore, that no action lies, as they were not competent to make a parol contract, and may avail themselves of their own disability.

This conclusion,—although I have not come to it without much doubt, (for the authorities are in some respects contradictory,)—seems to me warranted by the cases of *Sanders* v. *The St. Neot's Union* (*a*); *Beverley* v. *The Lincoln Gas Light and Coke Company* (*b*); *Church* v. *The Imperial Gas Light and Coke Company* (*c*), and others of the cases to which I have adverted, by the peculiar constitution and purposes of such a corporation as the board of guardians, and by the apparent justice of the case. I therefore think that the rule should be discharged.

Rule discharged.

(*a*) 8 Q. B. 810.
(*b*) 6 A. & E. 829.
(*c*) 6 A. & E. 846.

In re GRAY.

June 12.

Coram *Wightman, J.*

THIS was a rule calling on an attorney to pay over to his client a sum of money in his hands.

Although the exclusion by the Reg. Gen., Hil. Term, 2 Wm. 4, pt. 1, r. 6, of affidavits sworn before the party's attorney is limited to cases where there is a record, this Court rejects them also in applications where there is no cause in Court.

Maynard, in shewing cause, took a preliminary objection to four of the affidavits upon which the rule had been obtained, on the ground that they were sworn before the present attorney of the applicant.

Prideaux, contrà. The general rule of Hil. Term, 2 Wm. 4, pt. I., r. 6 (*a*), which declares affidavits inadmissible when sworn before the party's attorney, applies only where there is a record. In this case there is no action, and no record: consequently the rule does not apply. [He referred to *Read* v. *Cooper* (*b*), and *Doe* d. *Grant* v. *Roe* (*c*)].

Cleasby, amicus curiæ, mentioned *Turner* v. *Bates* (*d*).

Maynard, in reply, stated that the rule upon which he relied was the 15 Geo. 2, r. 11, Q. B. (*e*).

WIGHTMAN, J.—The only prohibitory part of that old rule is in the recital. In fact, it does not prohibit the practice at all. However, the Master tells me that it is the practice to reject affidavits sworn in this way; and I must be governed by it. I yield to the objection unwillingly, for I do not exactly see the reason for the rule.

The affidavits were accordingly rejected.

(*a*) "Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail."

(*b*) 5 Taunt. 89.

(*c*) 5 Dowl. 409.

(*d*) 10 Q. B. 292.

(*e*) "Whereas the swearing of affidavits before commissioners authorised to take affidavits in this Court, in causes wherein such commissioners are concerned as attorneys of the parties on whose behalf such affidavits are made, is and hath been disallowed as irregular, which, with respect to affidavits made of the cause of action before process sued out, in order to hold the defendants to bail, hath been found inconvenient, it is ordered, that from and after the last day of this Term, all affidavits of any cause of action before process sued out to hold defendants to bail, may be sworn before any commissioner authorized to take affidavits in this Court; although such commissioner be concerned as attorney for the plaintiff; and shall be deemed to be regularly taken." Peacock's Rules, K. B. 139.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Michaelmas Term.

IN THE SIXTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who usually sat in the Bail Court in this Term, was CROMPTON, J.

REGINA *v.* The MAYOR and ASSESSORS of HARWICH. *November* 9.

Coram *Crompton, J.*

LUSH moved for a rule calling on the mayor and assessors of the borough of Harwich to shew cause why a mandamus should not issue, commanding them to hear and adjudicate upon the case of William Butcher the younger, whose name was then on the list of the burgesses of that borough, and to adjudicate on the objection taken to his name being retained on that list.

The 5 & 6 Wm. 4, c. 76, s. 15, requires the overseers of the poor to make, every year, lists of all persons entitled to

The 17th sect. of the 5 & 6 Wm. 4, c. 76, requires that the person objecting to the name of another on the burgess list, shall give notice to the town clerk and the person objected to in the form set forth in the Schedule, or to the like effect. The form directs that the person objected to shall be described by his description in the burgess list.

Held, that a notice served on the party objected to omitting all description of him, and stating only the objector's intention to object to "your name," was insufficient.

be enrolled in the burgess roll for the year; and the 17th section enacts, that "every person whose name shall have been inserted in any burgess list for any borough may object to any other person as not being entitled to have his name retained in the burgess list for the same borough, and every person so objecting shall, on or before the 15th of September in every year, give the town clerk of such borough, and also give the person objected to . . . . . notice thereof in writing according to the form No. 3, in the said Schedule (D.) or to the like effect."

The form referred to is as follows:—

"To the town clerk of the borough of [*or to the person objected to, as the case may be*].

I hereby give you notice, that I object to the name of Thomas Bates of Brook's Farm in the parish of [*describe the person objected to as described in the burgess list*] being retained on the burgess list of the borough of

Dated the day of in the year

(Signed) JOHN ASHTON."

In the present case, Mr. Joseph Gant objected to the name of William Butcher, Jun., being retained on the list. The notice of objection served on the town clerk was precisely in the form given by the act; but that served on Butcher was as follows:—

"To Mr. William Butcher, Jun.

I hereby give you notice that I object to *your* name being retained in the burgess list of the borough of Harwich.

Dated this 15th day of September, A. D. 1852.

JOSEPH GANT.

Place of abode," &c.

"The property for which I am said to be rated," &c.

This notice was served personally on Butcher. When the case came on before the Court of revision, Butcher attended and objected that the notice served upon him was insufficient, as he was not described in it as required by the act. The objection was held fatal, and the name was retained on the list.

Lush now contended that this decision was erroneous. The 17th section does not require a literal adherence to the form given in the schedule; it is satisfied if the notice is "to the like effect." Here it has been substantially followed. [*Crompton*, J.—Neither the description required by the act, nor one "to the like effect," has been given; for the notice contains no description whatever]. The description of the party objected to is required, not for the purpose of pointing out the qualification objected to, but for identifying the party: it is essential in the notice given to the town clerk, to avoid confusion and ambiguity where two persons of the same name are on the list; but it is unnecessary in the notice served on the party himself, as no doubt could arise in that case as to the identity of the person intended; and the use of the pronoun without further description was, therefore, sufficient. The 6 Vict. c. 18 (for the registration of Parliamentary voters), which requires the service of similar notices on the overseers and the person objected to, gives two forms in the schedule; and that which is required for service on the former gives the description of the party objected to; but the notice intended for the party himself is in the terms adopted in the present case, viz., "I object to your name," &c. (*a*). That act is in pari materiâ with the other, and may be taken as illustrating the meaning of the words "to the like effect" in the 17th section of the 5 & 6 Wm. 4, c. 76.

CROMPTON, J.—I do not think that the provisions of the act of Parliament have been carried out in this case. The act requires that two notices shall be served "in the form" given in the schedule, "or to the like effect." I cannot say that the notice served on the party was "to the like effect." The object of the act was, perhaps, that as there might be more persons than one of the same name, the

(*a*) The form here referred to, however, is addressed to the person objected to, and directs that he shall be described by his name and place of abode as described in the list.

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notice should, on the face of it, point out distinctly to what party the objection was made. But it is not necessary to speculate on the intention of the Legislature: it is enough to say that its enactment has not, in my opinion, been complied with.

Rule refused.

November 19.

In the Matter of an Arbitration
Between The EARL OF CARDIGAN
and
PETER EDWIN HENDERSON.

Coram *Crompton, J.*

An award directed A. to pay 60*l.*, the costs of the award, to the arbitrator, and directed B. to repay A. that sum at a specified place and time, and to pay him also on the same day and at the same place, the further sums of 900*l.* and 90*l.*

In support of a rule for an attachment for not paying the three sums, A. stated that he attended at the proper time and place, but that neither B. nor any other person then paid the three sums or any of them, and that he, A., had not since received any of them. It was also sworn that the three sums had been demanded, and that none had been paid. It did not appear that A. had paid the arbitrator the 60*l.*

Held, 1, that B. was not liable to pay A. the 60*l.* until the latter had paid that amount to the arbitrator, and, therefore, that the rule for an attachment could not be made absolute as to that sum; but

2, that it sufficiently appeared that the 900*l.* and 90*l.* had not been paid, and that the Court might mould the rule and make it absolute as to those sums.

THIS was a rule calling on the defendant to shew cause why an attachment should not issue against him for not paying the sums of 945*l.* 15*s.* 11*d.*, 99*l.* 17*s.*, and 62*l.* 10*s.*, pursuant to an award and rule of Court.

It appeared upon the affidavits that disputes having arisen between the Earl of Cardigan and Mr. Henderson respecting a lease of a coal mine, the matters in difference were referred to the arbitration of Mr. Woodhouse; and the submission provided "that the costs of and attending the said reference, and the submission thereby made, and of the said arbitrator and his award, and the making that submission a rule of her Majesty's Court of Queen's Bench, should be in the discretion of the said arbitrator." The

award, which was dated the 30th April, ordered that Henderson should, on the 11th May, between ten and eleven o'clock, A.M., pay Mr. Marsden, Lord Cardigan's attorney, at his office in Wakefield, the sum of 945*l.* 15*s.* 11*d.*, for Lord Cardigan, in respect of the matters in difference, and 99*l.* 17*s.* for his costs of attending the reference; and that Lord Cardigan should, before the delivery of the award, pay to Edward Mortimer Green, of Ashby de la Zouch, (the arbitrator's attorney) the sum of 62*l.* 10*s.* for the costs of the arbitrator and of his award. He further awarded that Henderson should, on the said 11th of May, "repay" to Mr. Marsden, for Lord Cardigan, the said sum of 62*l.* 10*s.*

The only affidavits which denied the payment of the money were those of Mr. Marsden and of a Mr. McGregor. Mr. Marsden's affidavit stated that he attended at his office on the 11th of May at ten o'clock and remained there till eleven; that neither Henderson, nor any person on his behalf, between those hours paid the three sums above mentioned, or any of them, or any other sum; and that he, Mr. Marsden, had not since that time received from Mr. Henderson, or any person on his behalf, any sum of money for the use of Lord Cardigan. McGregor, who had been duly authorized under a power of attorney to demand the money, stated in his affidavit that he had, on the 6th of July, demanded the payment of the sums of 945*l.* 15*s.* 11*d.*, 97*l.* 17*s.*, and 62*l.* 10*s.*, but that Henderson did not then, or at any time afterwards, pay the said sums or any of them: and that the same remained due to Lord Cardigan, as he, McGregor, verily believed. Lord Cardigan did not make any affidavit.

D. D. Keane shewed cause. 1. As this is a motion of a penal character, the Court will not grant it unless the affidavits shew distinctly that the person against whom it is made has been guilty of a contempt. Now it is quite consistent with the affidavits that the money has been paid.

The Earl of Cardigan does not deny that he has received it; Mr. Marsden says merely that he did not receive it on the 11th of May or on any subsequent day, which is not inconsistent with his having received it before that day; and the only person who states that the money is still due is a stranger to the parties, and he only pledges his belief to the truth of his assertion.

2. But further, Mr. Henderson was right in refusing to comply with the demand which was made upon him. The demand was to pay three sums; and as it is not stated that Lord Cardigan paid the 62*l.* 10*s.* to the arbitrator's attorney in pursuance of the award, it does not appear that Mr. Henderson was bound to pay it to Lord Cardigan; for the claim of the latter is only to be *repaid* the arbitration fee. As Henderson was, at the utmost, liable to pay two sums only, he was justified in refusing to pay three (*a*); and this rule, which calls upon him to shew cause why an attachment should not issue against him for non-payment of the three, must be discharged, as he is not liable to pay all three. [*Poyner* v. *Hatton* (*b*) was cited].

Unthank. 1. The affidavits shew sufficiently that the money has not been paid. At all events, they state enough to require an answer; and if the fact were that the money had been paid, Mr. Henderson has now had the opportunity of saying so, which he has not done. In *Hare* v. *Fleay* (*c*), where the defendant was called upon to shew cause why he did not pay money under an award, it was objected that the money might have been paid between the day of the date of the affidavit (the 15th of April) and the day when

(*a*) It was also contended that the award was bad in respect of the 62*l.* 10*s.*, on the ground that the arbitrator was not entitled to assess his own fee; and the cases of *In re Coombs*, 4 Exch. 839, and *Fernley* v. *Branson*, Q. B., Hil. Vac. 1851, cited from 20 Law Journ., Q. B. 178, and *Russell on Arbitration*, p. 371, were referred to; but the Court expressed no opinion upon the point.

(*b*) 7 M. & W. 211.

(*c*) 2 L. M. & P. 392.

the rule was obtained (the 10th of May), but the Court did not attend to the objection (*a*).

2. The Court can infer from the direction in the award to pay the 62*l.* 10*s.* on a day now long past, and from the fact that that document is now in Lord Cardigan's hands, that the sum in question has been paid to the arbitrator.

CROMPTON, J.—I cannot presume that: the award may have been delivered to him for the purpose of making this application. It is quite clear that I cannot make the rule absolute as to the 62*l.* 10*s.*; for Lord Cardigan is only entitled to that sum after he has paid the amount to the arbitrator.

It is objected, however, that as the rule cannot be made absolute in its present form, I cannot grant an attachment at all: but I think I can. I think I may mould the rule with reference to that objection. The only remaining question is whether the non-payment of the other sums is sufficiently averred. The award directs that they shall be paid at a particular time and place to Lord Cardigan's attorney, who says that he has not received the money from Mr. Henderson, nor from any other person. That, coupled with the affidavit of the agent, who says that Henderson did not when demanded, nor at any time afterwards, pay the money, seems to me to be sufficient.

Rule absolute as to the sums of 945*l.* 15*s.* 11*d.* and 99*l.* 17*s.*

(*a*) See also *Reg.* v. *Dobson*, 9 Q. B. 302, and *Corbett* v. *Nicholls*, 2 L. M. & P. 87, 89.

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May 6.
November 22.

TAYLOR *v.* WARRINGTON.

Coram *Crompton, J.*

Held, that the sheriff was not entitled to deduct from the issues raised under a distringas to compel appearance, the sum of 4*s.* 6*d.* as a "discharge fee."

THIS was a rule calling upon the defendant to shew cause why a rule of Court and an order of *Patteson* J. which it embodied, should not be set aside.

A distringas to compel the defendant's appearance had been obtained, in the execution of which the sheriff of Middlesex made a levy; and the defendant paid him the 40*s.* to avoid the sale of his goods. He afterwards suffered judgment to go by default, and paid the debt and costs: after which he applied to the sheriff to repay him the 40*s.*; but the sheriff refused to comply without a Judge's order. The order of *Patteson* J., which it was now sought to rescind, was therefore obtained, requiring the sheriff to repay the defendant the sum of 40*s.*; but this the sheriff refused to do without deducting 4*s.* 6*d.* as a discharge fee. To this deduction the defendant would not consent: and he made the order a rule of Court with the view of enforcing it by attachment. The present rule was thereupon obtained by the sheriff.

D. D. Keane and *G. Francis* shewed cause. They contended that the table of fees settled by the Judges in pursuance of the 7 Wm. 4 & 1 Vict. c. 55, and which authorized the sheriff to take "for any supersedeas, writ of error, order liberati or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution, 4*s.* 6*d.*" They referred to the 10 Geo. 3, c. 50, and *Raban* v. *Plaistow* (*a*).

Quain, in support of the rule, cited 1 *Chit. Archb.* 8th

(*a*) 5 Burr. 2726.

ed., 182, *Cazalet* v. *Dubois* (*a*); *Martin* v. *Townshend* (*b*); *Bound* v. *Vaughan* (*c*).

Cur. adv. vult.

CROMPTON, J., now delivered the following judgment for COLERIDGE, J.—This case was argued before me so long since as May 6th, and the judgment has been delayed solely because it had escaped my recollection, and because the parties omitted to remind me of it, which I sincerely regret. It was a case in which 40*s.* had been levied by the sheriff on a distringas to compel appearance. The defendant had subsequently appeared and paid the debt and costs. An application had been made for the repayment of the 40*s.*, and after some delays and a negotiation, the repayment was refused, unless on a payment or deduction, by way of fee, of 4*s.* 6*d.* This was refused, and an order procured for the repayment of the 40*s.*: the present rule was to set aside that order. Two points were relied on: 1st, it was said that the defendant's claim to have the money returned could not be supported under the 10 Geo. 3, c. 50, on which it was made. That statute, by s. 3, after enacting that the Court "may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay *such costs* to the plaintiff as the Court shall think just, under all the circumstances, to order;" enacts that "the surplus" shall "be retained until the defendant shall have appeared, or other *purpose of the writ be answered.*" And s. 4, provides, that "when the *purpose of the writ is answered*, ... the said issues shall be returned, or if sold, *what shall remain* of the money arising by such sale shall be repaid to the party distrained upon." The case of *Cazalet* v. *Dubois* (*a*) was relied on as shewing that these words of the 4th section "must be understood with a reference to the constant

(*a*) 1 B. & P. 81.
(*b*) 5 Burr. 2725.
(*c*) 2 Chit. 36.

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jurisdiction of the Court." On which ground, in that case, where a party after having stood out, and issues had been levied on several distringases, appeared, and then applied to have all the issues returned, the Court would only do it on payment of costs, and his undertaking to plead instanter and take short notice of trial. This case differs much in its facts from the present, assuming it to have been rightly decided; and at all events could only be an authority that the Court might exercise a discretion, which in the case of an undoubted and satisfactory fee it might exercise in favour of the sheriff. I am clearly of opinion that the purpose of the writ is answered when the defendant has appeared, although it has not been returned; and then it is the duty of the party who resists the plain words of the statute to satisfy the Court clearly of the sheriff's right to the fee.

Now this fee is claimed, and can only be claimed, as authorized by the table prepared by the Judges under the authority of the 7 Wm. 4 & 1 Vict. c. 55, s. 2; and in that table will be found a fee of 4*s.* 6*d.* allowed "for any supersedeas, writ of error, order liberati, or *discharge to any writ or process,* or for the release of any defendant in custody (unless in the prison of the county), or of *goods taken in execution.*" The return of issues appears to me neither a discharge to a writ or process, nor the release of goods taken in execution.

The rule therefore should be discharged, and as any attempt to set up an unauthorized fee ought to be checked, and this is moreover in opposition to the order of a learned Judge, it must be discharged with costs.

Rule discharged.

REGINA *v.* The RECORDER of SHREWSBURY. *November* 23.

Coram *Crompton, J.*

A parish to which an order of removal is directed, may, after service of the order, appeal against it, although no notice of chargeability or statement of the grounds of removal has been served upon it.

THIS was a rule calling on the Recorder of Shrewsbury to shew cause why a mandamus should not issue commanding him to enter continuances, and hear an appeal against an order of removal of a pauper and his wife from the parish of St. Chad, in the borough of Shrewsbury, to the parish of Shawbury, in the county of Salop.

Upon the appeal coming on for hearing, the appellants were required to prove their notice and grounds of appeal, which they did. It appeared that a copy of the order of removal had been served on the appellant parish, but that no notice of chargeability or statement of the grounds of removal had been served. This omission was relied upon in the grounds of appeal; but the counsel for the respondent parish contended that the service of the notice of chargeability was a condition precedent to the right to appeal, and that as no such document had been served, the recorder had no jurisdiction to hear the appeal. The recorder adopted this view, and declined to proceed with the hearing of the case.

Pashley, in moving for the rule, cited *Reg.* v. *Brixham* (*a*) and *Reg.* v. *Mylor* (*b*).

Scotland shewed cause. The recorder acted rightly in refusing to hear the appeal: for the appellants had no grievance, and therefore no right of appeal. That right is wholly the creature of statute. The first act which conferred it was the 13 & 14 Car. 2, c. 12; by the 2nd section

(*a*) 8 A. & E. 375; S. C. 3 N. & P. 408. (*b*) 11 Q. B. 55.

of which it was enacted, that "all such persons who think themselves aggrieved by such judgment of the said two justices," that is, by any order of removal, "may appeal" to the next quarter sessions: and the question has been frequently raised, whether the appellant parish was aggrieved, within the meaning of that act, by the making of the order or by the actual removal; but it was held, in *Rex* v. *The Inhabitants of Norton* (*a*), which has been frequently recognised, that there was no grievance until removal. So, in *Reg.* v. *The Justices of Salop* (*b*), *Littledale*, J., stated in the course of his judgment, that it was by the removal of the pauper that the parish was to be considered as aggrieved, within the stat. of Car. 2. By the 4 & 5 Wm. 4, c. 76, however, another grievance was created. The 79th section enacts, that "no poor person shall be removed or removable, under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made,"—for which a statement of the grounds of removal is now substituted (*c*),—"shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: provided always, that if such overseers or guardians as last aforesaid, or any three or more of such guardians, shall by writing under their hands agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed: provided also, that if notice of appeal against such order of removal shall be received by

(*a*) 2 Stra. 831.
(*b*) 6 Dowl. 28, 32.
(*c*) By the 11 & 12 Vict. c. 31, ss. 1 and 2.

the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal." The 84th section is also material; it enacts, "that the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the costs and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the same manner as any penalties or forfeitures are by this act recoverable: provided always, that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted, the cost and expense of such relief and maintenance from such time only as notice of such poor person having become chargeable, shall have been sent by such relieving parish to the parish to which such poor person shall be so admitted or finally adjudged to belong."

The effect of this statute is, that "the grievance commences from the time when the notice of chargeability and other documents are served upon the opposite party;" per *Wightman*, J., in *Reg.* v. *The Justices of the West Riding* (*a*). It is not, indeed, necessary to contend that the service of the other documents is indispensable; probably the service of the notice of chargeability is enough, as the liability to pay for the pauper's maintenance commences (by sect. 84) from the date of its service; but, at all events, until that notice is served, no grievance exists under the statute of Wm. 4. The 11 & 12 Vict. c. 31, s. 9, treats the service of all the documents as a condition precedent to the right of appeal; and must be regarded as a legislative construc-

(*a*) 2 D. & L. 488, 491.

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tion of the law at the time of its passing. That section enacts, "that no appeal shall be allowed against any order of removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed;" unless within that period a copy of the depositions is applied for, in which case a further period of fourteen days after serving such copy is allowed. [*Crompton*, J.—The meaning of that section surely is, that if a notice of chargeability has been served, the notice of appeal must be given within a limited time afterwards]. If the appellants are called upon to prove their notice of appeal, they must shew that every legal requisite has been complied with; and among others, that it was served within twenty-one days from the service of the notice of chargeability. In the present case the pauper was not removed, nor was the appellant parish served with the notice of chargeability; they had, therefore, no grievance either under the statute of Car. 2, or of that of Wm. 4, in respect of which they could appeal; and no valid notice of appeal had been given, for none was given "within twenty-one days after notice of the chargeability," &c. [*Crompton*, J.—It would be strange if the statute made the acts of one party a condition precedent to the rights of the other]. No inconvenience can arise from this; for no grievance arises until notice of chargeability, and it is not unreasonable that no right of appeal should arise until the grievance has arisen.

With respect to the case of *Reg.* v. *Brixham* (*a*), which was cited when this rule was obtained, the point now raised was not taken in the argument or noticed in the judgment. There, as here, no notice of chargeability had been served on the appellant parish; and the only question argued was,

(*a*) 8 A. & E. 375; S. C. 3 N. & P. 408.

whether the omission to serve that notice was a ground of appeal, or whether it had not been waived by the appeal; but it was not suggested to the Court that the appeal itself was premature, as no grievance existed. It is also to be observed, that the 11 & 12 Vict. c. 31, had not then been passed. Nor is the case of *Reg.* v. *Mylor* (*a*) any authority against the present argument; for the only question there decided was, that a document referred to in the examinations was in effect part of them, and ought to be sent with them to the parish on whom the order of removal was served.

Pashley, in support of the rule. It is not, as alleged on the other side, the actual removal, but the notice of the order of removal, that is the grievance under the 13 & 14 Car. 2, c. 12. It must be admitted that the language frequently used in the books appears to favour the opinion that there is no grievance till actual removal; but as the removal of the pauper and the service of the order used formerly to be always effected at the same time, it was practically immaterial whether the one or the other was regarded as the grievance. *Rex* v. *Inhabitants of Norton* (*b*), was decided upon the authority of the case of *Milbrook and St. John's in Southampton* (*c*), where upon motion to quash an order on the ground that the appeal had been too late,—the order of removal bearing date the 12th February, and the appeal being to the Trinity Sessions,—*Parker*, C. J., and the Court said: "You cannot take this objection now; it is matter of fact, and perhaps the order was not served till after the sessions;" clearly shewing that the service of the order was the grievance. And this view is supported incidentally by the decision in *The Parishes of Northbrady* v. *Rhode* (*d*), "that it is not necessary to appear on the face of the order of appeal, that the appeal was at the next sessions after service." That which is appealed against is

(*a*) 11 Q. B. 55.
(*b*) 2 Stra. 831.
(*c*) Cases of Sett. and Rem. pl. 88, p. 66. Cited from 19 Vin. Ab. tit. Sessions of the Peace (E.) 5.
(*d*) 19 Vin. Ab. tit. Sessions of the Peace, (E.) 5, in marg.

not the removal, but the order of removal, and that is therefore the true grievance. In this case, therefore, a grievance existed, and with it the right to appeal.

If the argument which is urged upon the 9th section of the 11 & 12 Vict. c. 31, is to prevail, it must be carried to its legitimate length, and the Court must hold that the service of the statement of the grounds of removal is as essential to the opposite party's right to appeal, as the service of the notice of chargeability: and the neglect of the one party to serve it, may be fatal to the right of the other to appeal, although doubly aggrieved by the notice of chargeability and by the actual removal.

The case of *Reg.* v. *Brixham* (*a*), however, is conclusive upon the subject; for the Court there expressly decided that the neglect to serve the notice of chargeability was a ground of appeal, a decision which they could not have arrived at if they had been of opinion that no appeal whatever lay until that document had been served. [He referred also to *Reg.* v. *The Inhabitants of St. Mary, Whitechapel* (*b*)].

CROMPTON, J.—I must be bound by the authority of the case of *Reg.* v. *Brixham*, which I should have to overrule if I yielded to the ingenious argument of Mr. *Scotland*. I think it probable that the true rule is, that the appeal lies from the time of the service of the order. But however that may be, I think that when the Court of Queen's Bench said that the want of notice of chargeability was a ground of appeal, they must have decided that an appeal would lie. They did not, indeed, so decide in express terms, but such a decision must be necessarily implied. It is true, the point now urged was not taken; but I could not decide it in Mr. *Scotland's* favour without overruling that case. That I cannot do, sitting here. But for that authority I confess I should have taken time to consider the question.

Rule absolute.

(*a*) 8 A. & E. 375; S. C. 3 N. & P. 408. (*b*) 12 Q. B. 120.

HARRISON *v.* TYSAN, P. O. *November* 24.

Coram *Crompton J.*

PEARSE moved for a rule calling on George Cooper and another, members for the time being of a banking company, constituted under the 7 Geo. 4, c. 46, to shew cause why a sci. fa. should not issue against them in execution of the judgment recovered against the public officer in this action.

The rule for a sci. fa. against members for the time being of banking companies under the 7 Geo. 4, c. 46, is absolute in the first instance; and is not moved in open Court.

CROMPTON, J.—It is unnecessary to apply in open Court, and the rule is absolute in the first instance.

Rule absolute.

REGINA *v.* DENDY. *November* 24.

Coram *Crompton J.*

THIS was a rule calling on Arthur Hyde Dendy, the lord of the manor of Charlton, and Samuel Frederic Dendy, the steward of that manor, to shew cause why a mandamus should not issue, commanding them to admit Elizabeth Halford Payne to certain copyhold premises, part of the manor.

The Court will grant a mandamus to admit a copyholder claiming by descent, when the lord claims by escheat.

It appeared from the affidavits in support of the rule, that Mrs. Payne claimed to be admitted to the premises in question as heiress of Samuel Tull, her maternal uncle; and that her claim had been rejected on the ground that her legitimacy was questionable. There was no evidence of the date of her birth; but it appeared that she was

baptized on the 4th of January, 1787, five months and ten days after the marriage of her father and mother, which took place on the 25th of July, 1786.

T. Jones shewed cause. The lord claims the premises by escheat; and, therefore, the Court ought not to compel him to admit a person whose title he disputes. In *The King* v. *Rennett* (*a*), the Court refused to grant a mandamus to admit a person who claimed by descent; observing that "as the party making the application, claimed by descent, it could answer no purpose to grant a mandamus, since he had as complete a title without admittance, as with it, against all the world, but the lord." It is competent for the applicant to proceed by ejectment; and, as she has that remedy, the Court will not interfere by mandamus. In the case of *The King* v. *The Masters, &c., of the Brewers' Company* (*b*), where the Court awarded a mandamus to admit a person claiming by descent, there were conflicting claimants; and that circumstance materially distinguishes it from the present case. [*Crompton*, J.—Both parties claimed as heirs, and either might have brought ejectment. I should say that where it is suggested that the title is in the lord, there is the greater reason why a mandamus should go]. *The King* v. *Rennett* furnishes the true rule: the heir does not need admittance, and the Court ought not to prejudge the lord's title.

Ogle, in support of the rule. *The King* v. *Rennett* is overruled by *The King* v. *The Masters, &c., of the Brewers' Company*. "The circumstance of the customary heir having a complete title without admittance, as noticed by the Court in *The King* v. *Rennett*, is clearly no ground for denying the heir this summary remedy, for, independent of the rule, that the heir must be admitted before he can

(*a*) 2 T. R. 197.
(*b*) 3 B. & C. 172; S. C. 4 D. & R. 492.

bring a plaint in the nature of a real action, he may have objects in view which the remedy may assist, namely, to be put on the homage, or in nomination for various offices, or to surrender to a mortgagee." 1 *Scriven on Copyholds*, 627, 3rd ed. [He referred also to *Doe* d. *Hamilton* v. *Clift* (*a*), and was then stopped by the Court].

CROMPTON, J.—I am quite satisfied upon the authorities as to the general rule, that a person claiming as heir may have the writ. The question whether this party is legitimate is for a jury: but she makes out a *primâ facie* case; and that is enough to entitle her to the writ. I am quite satisfied, if it be necessary for me to say so, that *The King* v. *Rennett* has been overruled by the later decision. Indeed, I think the case for a mandamus is all the stronger when the lord claims the premises.

Rule absolute.

(*a*) 12 A. & E. 566.

REGINA *v.* The JUSTICES OF DERBYSHIRE.

November 23, 25.

Coram *Crompton J.*

THIS was a rule, calling on the Justices of Derbyshire to shew cause why a mandamus should not issue against them commanding them to receive an appeal.

Where the quarter sessions have a discretion, this Court has no jurisdiction to control it. Where, therefore, the quarter sessions have, by their practice, a discretion as to allowing or refusing the entry of appeals after the time fixed by their rules, and in the injudicious exercise of that discretion refuse to allow an appeal to be entered, this Court will not order them to receive it.

Where, however, it was left in doubt what the practice of the sessions on the subject was, and whether it had been acted upon in the particular case, this Court granted a rule for a mandamus to the justices to receive the appeal.

The following facts appeared upon the affidavits in support of the rule. A person named James Green, who had been convicted under the Vagrant Act (5 Geo. 4,

c. 83), and ordered to be committed for three months, gave due notice of appeal to the next quarter sessions, and complied with the other requisites of the act for that purpose. The recognizances into which he entered required him to appear and prosecute his appeal on Wednesday, the 20th of October, and the witnesses, also, were bound over to appear on that day. The appellant attended on the morning of the 20th, accompanied by his attorney, a gentleman practising in London, and before the sitting of the Court applied to the clerk of the peace to enter his appeal; but he was told that he was too late, that he ought to have applied on the preceding day, and that the appeal could not be received, unless the Court, upon a special application being made, allowed it. An application was made accordingly immediately upon the sitting of the Court, and before the grand jury were sworn, but the Court declined to interfere, on the ground that the appeal ought to have been entered on the preceding day.

In answer, the clerk of the peace of the county of Derby stated, that the practice of the sessions was to enter appeals on the first day of the sessions, which was on Tuesday, at the office of the clerk of the peace by eleven A. M., which practice was founded on an order of sessions made the 13th of July, 1830, directing that they should be entered before twelve o'clock on the first day; and that notice of the order was published before the sessions in question in four county papers. It set forth the advertisement verbatim, requiring appeals to be entered before eleven, and then stated that no appeal could be entered after the first day without special application. It also stated that the object of the rule of practice was, to enable the justices to decide, by reference to the amount of business, whether they would appoint a deputy chairman and have a second Court.

Boden, shewed cause. The cases of *R.* v. *The Justices of Wiltshire* (*a*), and *R.* v. *The Justices of Lancashire* (*b*), upon

(*a*) 10 East, 404. (*b*) 7 B. & C. 691.

the authority of which this rule was granted, have been much shaken by more recent decisions. The latter case, indeed, was decided on the authority of the former, simply, and without further argument. In *R.* v. *The Justices of the West Riding of Yorkshire* (*a*), *Parke*, J., said: "I do not quite approve of the language held in that case," that is, in *R.* v. *The Justices of Wiltshire* (*b*). "If the sessions have a discretionary power on the subject, this Court has not." So, in *R.* v. *The Justices of Monmouthshire* (*c*), *Patteson*, J., speaking of the same case, says: "That case is certainly one, in which some of the expressions have been, I will not say found fault with, but cautiously abstained from in later cases, because the Judges thought they went too far. . . . . How far there would be a similar decision now may be doubtful." Again, in *Reg.* v. *The Justices of Montgomeryshire* (*d*), *Wightman*, J., after referring to the cases above mentioned, said: "The result of those cases, and indeed of all the later authorities, seems to be this; that the quarter sessions are the judges of their own rules of practice, and that this Court will not interfere with their determinations respecting them, unless the rules upon which they have acted, are so unreasonable as to be illegal." In that case the sessions had refused to hear a respited appeal because their practice, requiring twenty-eight days' notice of trial of respited appeals, had not been complied with; and although the rule seemed to the learned Judge unnecessary, he refused to interfere. The principle on which *The King* v. *The Justices of Staffordshire* (*e*), which was also relied on, was decided, in truth illustrates the principle now contended for. There the appellant had given notice under the 53 Geo. 3, c. 127, s. 7, to the two justices who had made the order against him (for payment of a church rate) and to the churchwardens, of his intention to enter and respite an appeal from that order at the next (April) quarter sessions; which

(*a*) 5 B. & Ad. 667, 671.
(*b*) 10 East, 404.
(*c*) 3 Dowl. 306, 311.
(*d*) 3 D. & L. 119, 123.
(*e*) 4 Ad. & E. 842; S. C. N. & M. 477.

was accordingly done: but when the appeal came on for trial, the sessions refused to hear it, because one only of the justices who had made the order had been served with a notice of the appellant's intention to try,—contrary, as it was held, to the rule of practice of the sessions, which required that each justice making the order should be served. The Court of Queen's Bench granted a mandamus to hear the appeal, not on the ground that they had a right to interfere with the discretion of the sessions, but because the sessions had no right to introduce a new condition of appeal, which was not in the act of Parliament. In *Reg.* v. *The Justices of Surrey* (*a*), a mandamus was granted upon the same ground.

But even if the Court has the power of interfering with the sessions, it will not do so in this case. The rule of practice upon which they proceeded is reasonable and convenient, and has been long established; in which respect this case is distinguishable from *The King* v. *The Justices of Wilts* (*b*), where the practice impugned was quite recent. If the Court thinks that it is unreasonable to require that appeals should be entered in the first day of the sessions, is it prepared to say what is a reasonable time, and to lay down a general rule on the subject?

Huddleston, in support of the rule. *The King* v. *The Justices of Wilts* has never been overruled. Lord *Ellenborough* there lays it down broadly that this Court has a "kind of visitatorial jurisdiction" over the justices in their exercise of any discretionary power. [*Crompton*, J.—What did he mean by a "visitatorial jurisdiction?" Certainly we are not visitors in the ordinary sense of the word. A visitor of a college goes to the college, and has all the facts laid before him. What you contend for amounts to this: that every case where the sessions have a discretion may be brought into this Court, upon affidavit, to have the exercise

(*a*) 6 D. & L. 735. (*b*) 10 East, 404.

of that discretion rectified. But does this Court ever interfere with an inferior Court in the exercise of its discretion? Suppose an application were made for a new trial on the ground that the damages were excessive, would this Court review the decision of the inferior Court in such a case?] *The King* v. *The Justices of Wiltshire* was followed by the full Court in *The King* v. *The Justices of Lancashire* (*a*), and it must be observed that the cases which have been regarded as shaking it are decisions of single Judges only, sitting here. [He referred also to *Reg.* v. *The Justices of Merionethshire* (*b*) and *Reg.* v. *Justices of Glamorganshire* (*c*). He also commented upon the affidavits.]

Cur. adv. vult.

CROMPTON, J., now delivered judgment. His Lordship, after adverting to the nature of the application, said:—This case appeared to me to be one of considerable hardship. The party convicted had given the proper notices and entered into the proper recognizances; and he attended on what may be called the first "working" day of the sessions. It appears that it is the practice of the sessions to meet on the Tuesday, when they dispose of the county business, and adjourn the general business to the following day. The witnesses had been bound over to attend on the Wednesday, and they attended on that day accordingly. The defendant also attended early on that day with a London attorney, but upon applying to enter his appeal he was told that he was too late, that it should have been entered the day before, and that it could then only be done upon a special application to the Court. He applied accordingly; and if the Court had any discretion to relax the general rule, it is difficult to imagine a stronger case for relaxing it and allowing the appeal to be entered. If they had a discretion, I have no doubt they exercised it very improperly; for I feel that the case was one of great hardship.

(*a*) 7 B. & C. 691. (*b*) 6 Q. B. 163.
(*c*) 1 L. M. & P. 336.

The question is, however, whether I can interfere: for whatever be the hardship of the particular case, I can only act upon general rules. It was contended that this Court had a kind of "visitatorial" power over the discretion of the justices: that is the expression used in the two cases upon the authority of which I granted this rule. In one of them, *The King* v. *The Justices of Wiltshire* (*a*), Lord *Ellenborough* says expressly: "The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal; but we have also a kind of visitatorial jurisdiction over them, in the exercise of such a discretionary power;" &c. In the subsequent case, *The King* v. *The Justices of Lancashire* (*b*), which was decided on the authority of *The King* v. *The Justices of Wiltshire*, Lord *Tenterden* says, speaking of the justices: "They certainly have a discretionary power to make rules for the governance of the practice at the sessions, but the case cited shews that this Court, for the purposes of justice, will interfere to control that discretion." But, upon cause being shewn to this rule, I certainly felt considerable doubt as to how far those cases would be now followed: and I think that the principle of interfering with the discretion of the sessions has been much qualified by recent decisions. The old law has been much shaken by the cases of *Rex* v. *The Justices of Monmouthshire* (*c*) and *Reg.* v. *The Justices of Montgomeryshire* (*d*); but much more by what fell from the Court, and especially from *Parke*, J., in *The King* v. *The Justices of the West Riding of Yorkshire* (*e*). I find that *Parke*, J., says expressly in his judgment: "We have no right to interfere with the discretionary power of the sessions; where they have that power, their discretion is to be confided in:" and he expressed a similar view in the course of the argument (*f*). With that language I entirely concur: it is consonant with the recent decisions; and if

(*a*) 10 East, 404.
(*b*) 7 B. & C. 691.
(*c*) 3 Dowl. 306.
(*d*) 3 D. & L. 119.
(*e*) 5 B & Ad. 667, 672.
(*f*) Page 671.

the only question now was, whether or not this Court would set its discretion against the discretion of the sessions, I should refuse to act upon the old cases. Or if it had distinctly appeared that the sessions had acted upon a rule of practice which was not unreasonable in itself, I should not have interfered; for I think it must be taken that, even under the old cases, where the rule of the sessions is not in itself unreasonable, this Court does not interfere.

If this had been the only question, I should have thought that this rule ought to be discharged; but, on looking into the affidavits, I find them so indistinct, that it does appear what the practice of the sessions is, or whether it was acted upon in this case. To make out their case, the justices should shew that there is a distinct rule of practice, and that they acted upon it. Now, the clerk of the peace states in his affidavit, that the practice is to enter appeals before eleven o'clock in the morning of the first day of the sessions; and that that practice is founded on an order of the sessions, that they shall be entered before twelve o'clock. This, he says, is done for the purpose of letting the justices decide, upon seeing the amount of business, whether they will divide the Court. In another part of the affidavit, I find it stated that no appeal can be entered after the first day without a special application. It would seem, therefore, that on special application being made, it would be entered after the first day. Is it the practice, then, that appeals must be entered at eleven, or at twelve o'clock on the first day, or, after the first day, upon special application to the Court? This is left indistinct. I have doubts also as to the grounds on which the Court proceeded. It is stated, and not denied, that they refused, not because they considered the case was not a fit one for their interference in the exercise of their discretion, but merely because the appeal was not entered on the day before. I think, under these circumstances, that there is enough for the writ going. If it should be returned, that there is an

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express practice of the sessions, that they have a discretion in allowing or refusing appeals to be entered after the first day, and that they exercised their discretion in this case, I think no peremptory mandamus could issue. Therefore, not on the ground that this Court ought to interfere with the discretion of the justices:—for I agree with *Parke*, J., that we have no such power, and I think it would be a most dangerous power, if we had it;—but on the contrary, repudiating that doctrine, I think, that there is enough on the affidavits for the writ going.

Rule absolute.

November 25.

BROOKE *v.* BROOKE.

Coram *Crompton, J.*

Where defendant put in bail after the time limited by the capias, the Court allowed him, upon an affidavit denying that he owed the sum for which he was sued, to take out of Court the money which he had paid in lieu of bail under the 43 Geo. 3, c. 46.

THIS was a rule calling on the plaintiff to shew cause why the sum of 63*l.* deposited by the defendant with the sheriff in lieu of bail, he having put in and perfected bail, should not be paid out to the defendant.

The action, it appeared from the affidavits, was commenced on the 14th of July, to recover 53*l.*; and the defendant was arrested on the same day. He thereupon, in lieu of putting in bail, paid to the officer, in compliance with the 43 Geo. 3, c. 46, s. 2, the sum indorsed on the writ, and 10*l.* to answer costs; and was discharged from custody. The sheriff was ruled to return the writ, and he paid the sum of 63*l.* into Court. The defendant afterwards put in and perfected bail; but he did not do so within eight days from his arrest, as required by the capias. In his affidavit in support of this rule, the defendant swore he did not owe the plaintiff the money for which he was sued, or any other sum whatever.

Hawkins shewed cause. The case of *Geach* v. *Coppin* (*a*) is conclusive against this application: for it was there decided that when bail is not put in within the time required by the capias, the defendant is not entitled to take the money out of Court. So, in *Young* v. *Maltby* (*b*), the defendant's right to take it out is stated to depend upon his justifying bail in due time. In *Tuton* v. *Gale* (*c*), it was held that a plaintiff is entitled at once to take out of Court the money which a defendant has paid in lieu of bail, if the latter has neglected to put in bail in due time.

C. Pollock, in support of the rule. "The Courts, whenever this money has been paid in, have exercised a discretionary power over it when the defendant has not put in and perfected special bail in due time;" per *Littledale*, J. in *Geach* v. *Coppin;* and in exercising that discretion it is not to be forgotten, that "this act was made in ease of defendants, and not for the benefit of plaintiffs;" *Tidd Pr.* 227, 8th ed. (1824). *Littledale*, J. further says, in the case referred to, that the Courts "sometimes extend the time of putting in bail, under the circumstances of the case, whether upon an affidavit of merits, or otherwise." "But," he adds, "this rule comes before the Court upon the mere naked point, whether the defendant having put in bail after the time, he is, as a matter of right, entitled to have this money out of Court" (*d*). The present case is, therefore, distinguishable from *Geach* v. *Coppin* (*a*), in the material circumstance that the defendant swears he has a defence on the merits. It is clear from the passage of *Littledale*, J.'s judgment first cited, that if an application, supported by this affidavit of merits, had been made in this case for an extension of time for putting in bail, it would have been granted, and the defendant would then have been entitled to have the money returned to him: but the plaintiff is now in no worse position than if such appli-

(*a*) 3 Dowl. 74.
(*b*) Ibid. 604.
(*c*) 1 Dowl. N. S. 383.
(*d*) 3 Dowl. 79.

cation had been made. In *Newman* v. *Hodgson* (*a*), the Court, in allowing the plaintiff to take the money which had been paid in lieu of bail, observed that they thought him entitled to it, "as the render was not in due time, and *there was no affidavit of merits.*" [*Crompton*, J.—I observe that *Littledale*, J., says: "I do not think the plaintiff can be considered as having waived his right to oppose your application to take this money out of Court, in consequence of his not having applied for that purpose himself (*b*);"—so that he seems to proceed a good deal on the supposition that the plaintiff is entitled to take the money out of Court.] In *Sherwinski* v. *Peronnet* (*c*), the Court of Exchequer refused to allow the plaintiff to take out of Court the money which the defendant had paid in in lieu of perfecting bail, observing that the plaintiff had obtained all the security he was entitled to.

CROMPTON, J.—I think this case is different from *Geach* v. *Coppin* (*d*). That proceeded on the ground that the plaintiff might have come and applied for the money; and turned, as *Littledale*, J., says, upon "the mere naked point, whether the defendant having put in bail after the time, he is, as a matter of right, entitled to have his money out of Court." Here the plaintiff is clearly not entitled to have the money, for the defendant swears that he has a good defence on the merits. I do not see what the plaintiff has to complain of; he loses nothing that he is entitled to. I think, therefore, that I ought to make this rule absolute.

Rule absolute.

(*a*) 2 B. & Ad. 422.
(*b*) 3 Dowl. 78.
(*c*) 6 M. & W. 90; S. C. 8 Dowl. 229.
(*d*) 3 Dowl. 74.

AMIES and Another *v.* KELSEY.

November 24, 25.

Coram *Crompton, J.*

In an action for the infringement of a patent, the Court will not grant an inspection of the defendant's machinery under 15 & 16 Vict. c. 83, s. 42, unless it appear that an inspection is necessary and material for the purposes of the cause.

Semble, that such inspection may be granted before declaration.

THIS was a rule calling on the defendant, under the 15 & 16 Vict. c. 83, s. 42, to shew cause why he should not allow the plaintiff and his witnesses to inspect the machinery and apparatus employed in the manufacture of braid, alleged to be an infringement of the plaintiff's patent.

The affidavit of Amies stated that he had obtained letters patent in February, 1851, for the invention of "improvements in the manufacture of braid and in the machinery or apparatus connected therewith," and that he enrolled the specification; that the defendant had infringed the invention by producing fringe braid of the same character as that patented, and selling the same; that the invention was new; that one specimen of the waved fringe braid which was annexed to the affidavit, had been produced by his own machine, and that another specimen, also annexed, and sold by the defendant had been, in deponent's belief, produced by braiding machinery of the kind described in plaintiff's specification, or by some mechanical equivalent; —on which point his opinion was corroborated by the affidavit of a braid manufacturer;—that he had instructed his attorney to bring an action against the defendant for his infringement of the patent; and that he had applied for, and been refused the inspection now sought. The clerk of the plaintiff's attorney stated that on the 25th of October he had issued a writ of summons against the defendant in an action on the case, and that the defendant had appeared.

The affidavit of the defendant's attorney verified a copy of the writ, which was in the form given by the Common Law Procedure Act (15 & 16 Vict. c. 76), and stated that no declaration had been yet delivered.

Hindmarch shewed cause. 1. This application is premature. It is made under the 15 & 16 Vict. c. 83, s. 42, which authorizes the Court in which any action for the infringement of a patent "is pending" "to make such order for an injunction, inspection, or account, and to give such direction respecting such action, inspection, and account, and the proceedings therein respectively," as the Court may think proper. The object of the enactment was to give the Courts of common law the same jurisdiction as Courts of equity, to be exercised in the same manner and under similar circumstances only. But the Courts of equity have never granted an inspection until after bill filed; and this Court ought not to grant it before declaration. Here the action has not proceeded beyond service of the writ and appearance: and although the affidavits state that an action on the case has been commenced for the infringement of the patent, it is obvious that the plaintiff might declare upon a bill of exchange or for an assault. [*Crompton*, J.—The affidavit satisfies me that the action is brought for infringing a patent. The act does not say that the Court is to grant an inspection "after declaration;" and I do not see why the power should be so limited. The plaintiff probably wants to know how to declare; and if the Court refused him an inspection till after declaration, he would, in all probability, have to amend it.]

2. The affidavits, at all events, do not shew sufficient grounds for an inspection. In equity an inspection is seldom granted; and it is never granted unless the Court is satisfied that it is necessary for the protection of the plaintiff, and that the invention is new and the patent good. [*Crompton*, J.—Is the Court to go into the whole of the case, upon such an application?] The plaintiff must make out a primâ facie case at least: otherwise any person might, under colour of any patent, however worthless, obtain an inspection of any body's machinery and pry into his trade secrets. The inspection is not granted in equity until after

the discussion of the motion for an interlocutory injunction, which is generally applied for immediately after the bill is filed, and is heard upon affidavits supporting and impugning the patent: so that the Court does not act without ample materials. Here no case of necessity is made out: the affidavits do not point out what evidence the plaintiff needs, or expects to get by the inspection; nor does the plaintiff swear that he cannot safely go to trial without an inspection. In *Pepper* v. *Chambers* (*a*), the Court refused to allow the plaintiff to inspect a book in the defendant's possession, which, he stated, he was advised that it might be necessary for him to give in evidence, and that he could not safely proceed to trial without an inspection of it.

T. Webster. 1. The 42nd section authorizes the Court in which the "action is pending" to make this order: and the 41st section renders it very important that the inspection should be granted before declaration, for it requires the plaintiff in any action for the breach of letters patent, to "deliver with his declaration particulars of the breaches complained of;" and enacts, that at the trial "no evidence shall be allowed to be given in support of any alleged infringement . . . . . which shall not be contained in the particulars delivered as aforesaid." [*Crompton*, J.—I do not feel much pressed by this objection.]

2. The affidavits make a sufficient case for the interference of the Court. The general rule respecting inspection is correctly stated in *Hindmarch on Patents*, p. 347, "When the plaintiff has procured strong presumptive evidence that the defendant is infringing his patent, and is unable to obtain clear or satisfactory proof without an inspection of the defendant's machinery or premises, the Court will order the defendant to permit an inspection, on behalf of the plaintiff, by proper persons to be named in the order." Here, strong presumptive evidence of an

(*a*) Exch., Hil. Term, 1852. Cited from 21 Law Journ., Exch. 81; S. C. 7 Exch. 226.

infringement is given, but clear proof cannot be obtained without an inspection. The case of *Pepper* v. *Chambers* (*a*) is not an authority against this application. It turned upon a different statute, the object of which was, says *Pollock*, C. B., "to compel production of what is material at the trial, not to obtain information whether it is material or not," which is the object of the 42nd section of this act.

Cur. adv. vult.

CROMPTON, J.—This was an application under the 42nd section of the New Patent Act, 15 & 16 Vict. c. 83, for an inspection by the plaintiffs and their witnesses of the machinery and apparatus employed by the defendant in the manufacture, alleged to be an infringement of the plaintiff's patent. The motion was founded on affidavits of the title of the plaintiffs to the patent; of the infringement by the defendant in making and selling a similar article to that produced by the plaintiff; of the bringing the action, and of an application and refusal to be allowed to inspect.

Two objections were made by Mr. *Hindmarch* on the part of the defendant. It was said in the first place, that the application was premature, the plaintiff not having yet declared. I see no reason for limiting an inspection under the statute to the period after declaration. There is no such limitation in the enactment which is general and applicable whenever an action is pending, and an inspection may frequently be desirable or necessary for the purpose of declaring.

It was said in the second place, that no case for an inspection is made out on these affidavits. It was argued by both sides that the object of the statute is to enable the Courts of law to give such an inspection of machinery as a Court of equity would give, and it was urged for the

(*a*) Exch. Hil. Term, 1852, cited from 21 Law Journ., Exch. 81; S. C. 7 Exch. 226.

defendant that it was by no means of course in equity to grant an inspection. On the part of the plaintiffs, Mr. *Webster* cited a passage from Mr. *Hindmarch's* book, where it is said, that where there is strong primâ facie evidence that the defendant is infringing, and the plaintiff is unable to obtain clear and satisfactory proof without inspection of the defendant's machinery or premises, the Court will order an inspection by proper persons to be named in the order. It was stated that the instances of Courts of equity interfering by ordering an inspection was by no means of every day occurrence. It is not necessary, however, in the present case, to consider what a Court of equity would do in such cases, nor how far this Court is to be guided in granting inspection under the new statute, by what would be done in equity, nor to consider what case the party applying for such inspection must make out, because I think I am strengthened, by the passage cited by Mr. *Webster* from Mr. *Hindmarch's* book, in the opinion that an inspection ought not to be granted entirely as of course, and without the party applying for it shewing at least that it is material and really wanted for the purposes of the cause. That has not been done here. On these affidavits there is no suggestion of the information to be gained by an inspection being necessary, material, or even desirable, or of its being really wanted. But as the plaintiffs may be able, either now or at a subsequent stage of the cause, to supply these defects, and to make a case entitling themselves to the inspection prayed, and as this is the first discussion on the subject, I think that the rule should be discharged without prejudice to the plaintiffs' renewing their application on amended affidavits.

Rule discharged.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Hilary Term.

IN THE SIXTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who usually sat in the Bail Court in this Term, was ERLE, J.

January 17.

REGINA *v.* NEWHOUSE.

Coram *Erle, J.*

MASSEY moved for a rule calling on the defendant to shew cause why the Clerk of Assize of the Western Circuit should not review his taxation in this case.

This was an indictment for libel; and it was tried at Winchester at the Spring Assizes of 1852, on the Crown side, before *Talfourd*, J., under the Commission of Oyer and Terminer. Two pleas were pleaded: 1. Not guilty; and, 2, a justification, upon the first of which the defendant obtained a verdict, on the ground that the alleged libel was a privileged communication; and upon the second the jury found for the Crown. The Clerk of Assize, upon

This Court has no jurisdiction to direct the clerk of assize to review his taxation of costs (under the 6 & 7 Vict. c. 96, s. 8) of an indictment for libel tried on the Crown side under the Commission of Oyer and Terminer.

Semble, however, that one of the Judges who was a commissioner under that commission has jurisdiction to do so, until the commission is superseded.

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taxation of the costs under the 6 & 7 Vict. c. 96, s. 8 (*a*), having disallowed the expenses of two witnesses for the prosecution, the present application was made.

ERLE, J.—As a Judge of the Court of Queen's Bench, I have no power to entertain this application. If you apply to me as one of the Judges who were appointed by the Commission of Oyer and Terminer under which the indictment was tried, I think I might have interfered before that Commission had been superseded; but the Commission for the Spring Assizes was superseded by the one issued last Summer, and therefore I do not think I can interfere at all.

Rule refused.

(*a*) Which enacts, "That in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried."

January 25.

LLOYD *v.* MANSELL.

Coram *Erle, J.*

The attorney of one party to a cause and reference is not entitled to call upon the other to pay him, the attorney, the moneys awarded to be paid to his client.

LUSH moved, on behalf of the plaintiff's attorney, for a rule on the defendant to pay him the sums of 1*l.* 12*s.* 4*d.* and 33*l.*

This action, it appeared, had been referred to arbitration, the costs of the cause, reference and award to abide the event. The award adjudged the plaintiff entitled to

recover 1*l.* 12*s.* 4*d.*, and ordered the defendant to pay that sum and the costs (which were subsequently taxed at 33*l.*) to the plaintiff, or to Jeffreys, his attorney, to or for his use. The plaintiff afterwards petitioned the Court of Insolvent Debtors under the 1 & 2 Vict. c. 110, and obtained his discharge; subsequently to which the applicant gave notice to the plaintiff's assignees and to the defendant, that he claimed a lien upon the abovementioned sums, and that he required payment of them for his own benefit, and not for the benefit of the plaintiff.

Lush. The attorney has a lien for his costs upon money or costs awarded to be paid to his client in a matter in which he acted as attorney. It is true, the Court of Common Pleas, in *Holcroft* v. *Manby* (*a*), held that the attorney of one party to an arbitration is not entitled to an order upon one of the other parties to it, to pay him the sum awarded to be paid to his client; but that case is distinguishable from the present in the circumstance that the party called upon had not been originally a party to the cause or the reference, but had subsequently consented to be made a party to the reference. It appears from *Barker* v. *St. Quintin* (*b*), that the attorney's only course of proceeding in a case like the present is by applying to the equitable jurisdiction of the Court.

ERLE, J.—It is only as the agent of and representing the plaintiff, that the attorney is entitled to call upon the defendant to pay the money in question. But this application is like bringing an action in the name of an agent, upon a contract made with the principal. Upon principle my mind is against you; and the authority referred to confirms me in my opinion.

Rule refused.

(*a*) 7 M. & Gr. 843; S. C. 2 D. & L. 319; 8 Scott, 473.

(*b*) 12 M. & W. 441.

January 18, 19.

REGINA *v.* SMITH.

Coram *Erle, J.*

A contract by the father of a child with another person that the latter shall have the custody of the child, is in the nature of a consent merely, and may be revoked by the father. And the Court will, upon such revocation, grant a habeas corpus to bring up the body of the child.

ON a former day in this term a writ of habeas corpus was issued upon the application of Nathaniel Boreham, and directed to Edward Smith, commanding him to bring up the body of Emma Susan Boreham, an infant of five years of age, and the daughter of Nathaniel Boreham, upon whose application the writ issued.

It appeared from the return that the defendant was the brother of Boreham's wife, and uncle of the child. In May, 1852, an agreement was entered into by Boreham with Smith, by which,—after reciting that Mrs. Boreham was then dangerously ill, and had, with her husband's consent, requested Smith to take charge of and educate, in the event of her death, her infant daughter, which he had agreed to do upon condition that the child should be permitted to remain with him until she was grown up and able to provide for herself,—it was witnessed, that in consideration of Smith's agreement, Boreham solemnly promised and agreed with Smith that he would permit and suffer the infant to reside with Smith until she should be grown up and able to provide for herself, and that he would not in any way interfere with Smith in the bringing up and education of the child, nor remove, nor seek to remove her from Smith's care, but would at all times permit her to remain with him as his adopted child; and further, that he would pay Smith 14*s.* per month for her support and education. It was, however, provided that Boreham should be at liberty to visit and have access to the infant at all reasonable times. The mother died soon afterwards, upon which Smith took possession of the child.

Henniker, in support of the return. As the father has contracted that the defendant should have the custody of the infant, the former is not now entitled to it, or, at all events, to the interposition of the Court in his favour. The question is, whether the child is imprisoned. If a person of full age were to contract to reside in a particular country, it would be absurd to say that he was imprisoned in that country. Here the child could not enter into such a contract, but the parent did for her, and therefore it cannot be said that she is imprisoned. [He was here stopped by the Court.]

Prentice, contrà. The contract which is relied upon may be rescinded by the father: and he has rescinded it by demanding the custody of the infant. [*Erle*, J.—He is entitled to a habeas corpus against any person who imprisons his daughter.] The defendant is now imprisoning her, for he detains her against her father's will. It has never been held that a father can irrevocably assign the custody of his child to another. He may, indeed, contract to do so, and he may be liable to an action if he commits a breach of his contract; but he is the legal guardian of the child, and this Court will interfere if the child be detained from him against his will. Suppose the child should be ill-treated by the person to whom it was assigned under such a contract, could it be contended that the father would have no right to interfere and take possession of the child? *Ex parte Skinner* (*a*) is a strong case in support of the right of the father to the possession of his child. There the child had been in the custody of the mother, towards whom the father had acted with great brutality, which had led to a separation. Having obtained a habeas corpus, he agreed, upon the parties attending before *Best*, J., that the child should be placed under the care of a third person; after which he took it away by fraud and stratagem. A habeas corpus was then issued at the instance of the mother; when,

(*a*) 9 B. Moo. 278.

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in addition to the above facts, it appeared that the father was in gaol, and was cohabiting with another woman. The Court nevertheless refused to interfere. [He referred also to *The King* v. *De Manneville*(*a*), and *The King* v. *Greenhill*(*b*).]

Henniker, in reply.

Cur. adv. vult.

ERLE, J., delivered judgment on the following day.—I have looked into the cases bearing on this question. It seems to me that the arrangement between the father and the uncle is in the nature of a consent by the former that the latter should have the custody of the child, and a contract by the father to pay for its support as long as the custody should continue. Being a consent, the father is at liberty to revoke it; and upon his doing so, his paternal right revests in him, and he becomes entitled to the custody of his child. I am bound to say that the legal right to the custody of the child is in the father: and I order her to be delivered up to him.

(*a*) 5 East, 221. See also *De Manneville* v. *De Manneville*, 10 Ves. 52.

(*b*) 4 A. & E. 624; S. C. 6 N. & M. 244.

November 24. *January* 26.

REGINA *v.* The TRUSTEES of the BALBY and WORKSOP TURNPIKE ROAD.

Coram *Erle, J.*

By the 81st section of the General Turnpike Act (3 Geo. 4, c. 126) the trustees of a turnpike may borrow money upon mortgage. The form of mortgage given assigns the tolls, toll-gates, and toll-houses to the mortgagee, to hold for the residue of the term for which the tolls are granted, unless the mortgage money, with interest, be sooner repaid. The 49th section of the act empowers the mortgagee to bring ejectment, to repay himself.

Held, 1, that such a mortgage is *bona notabilia* where the road and toll-houses are, and not where the deed is at the time of the mortgagee's death;

And, 2, that the deed conferred no legal right on the mortgagee to the payment of the principal or interest; and, consequently, that a mandamus to pay the money did not lie against the trustees.

THIS was a rule calling on the defendants to shew cause why a writ of mandamus should not issue commanding

them to pay to John Frederick Dawson, as administrator of the goods of J. T. Dawson deceased, the sum of 20*l.*, less property tax, being one year's interest upon a mortgage debt of 500*l.*

The defendants were trustees for putting into execution an act (9 Geo. 4, c. xlvi.) for amending and maintaining a turnpike road from Balby in Yorkshire, to Worksop in Nottinghamshire; and in the execution of their trust they borrowed 500*l.* from William Dawson. The repayment of this sum with interest at 4*l.* per cent. was secured by a mortgage in the form given by the 81st sect. of the General Turnpike Act (3 Geo. 4, c. 126). By this deed the trustees, in consideration of 500*l.* advanced and paid by W. Dawson to their treasurer, granted to W. Dawson "such a proportion of the tolls arising and to arise on the said turnpike road, and the toll-gates, chains and toll-houses erected, or to be erected for collecting the same, as the said sum of 500*l.* shall bear to the whole sum now or hereafter to become due and owing on the security thereof; To have" &c. "the same proportion of the said tolls, gates," &c. "with the appurtenances, unto the said W. Dawson, his executors," &c. for the residue of the term for which the tolls were granted by the act, unless the 500*l.* with interest at 4*l.* per cent. per annum were sooner repaid. The turnpike road in question was situated in the province of York. The mortgage was, in September 1842, assigned to J. T. Dawson, who died in 1850, intestate. The mortgage deed was then in his house, in the province of Canterbury; and the applicant John Frederick Dawson having obtained, in the Prerogative Court of the Archbishop of Canterbury, letters of administration of the intestate's estate and effects, demanded the payment of the interest of the mortgage debt, which was refused on the ground that he had not taken out administration in the province of York.

Cowling shewed cause. 1. The Canterbury letters of administration are insufficient: administration should have

been obtained from the Archbishop of York. The legal estate or interest in the tolls, toll gates, &c., comprised in the mortgage is vested in the mortgagee, to hold until the money be paid: but the deed contains no covenant by the trustees to pay principal or interest, nor is any implied. In *Pardoe* v. *Price* (*a*) it was held that a mortgagee of turnpike tolls could not sue the trustees in debt for arrears of interest. So in *Hart* v. *The Eastern Union Railway Company* (*b*), the first part of the mortgage deed assigned the undertaking and tolls of the defendants to the plaintiff, to hold until 1000*l.* were repaid with interest; and it concluded with these words: "the principal sum to be repaid on the 1st day of January, 1851." The Court held that the latter words imported a covenant to pay; but in giving judgment said, that if the instrument had stopped at the first part, it would have operated simply as a transfer, and would have given no right of action to the plaintiffs. Here, the mortgagee's only remedy is by a suit in equity, or by ejectment, under the 49th sect. of the 3 Geo. 4, c. 126. Such a mortgage deed is not bona notabilia; it is like "leases or terms for years," which "constitute bona notabilia where the land lies, and not where the leases were at the time of the testator's death. Mortgages for terms of years are also considered as bona notabilia, where the mortgaged lands are situate."—*A brief treatise on Bona Notabilia by G. Lawton, Notary Public, one of the Procturs of the Ecclesiastical Courts of York*, p. 16, 1825. [*Crompton*, J.—Is a mortgage in fee bona notabilia, and not a mortgage for years?] If a mortgage in fee be bona notabilia, it is because it contains a covenant to pay; which this deed does not. [*Crompton*, J.—If your argument be well founded, the mortgage is not bona notabilia at all.] It is, like a mortgage for a term of years, bona notabilia where the lands are situated. [*Crompton*, J.—Or rather, like a devise of land to executors for payment of debts and legacies, which, ac-

(*a*) 11 M & W. 427; 13 M. & W. 267; and 16 M. & W. 451.

(*b*) 7 Exch. 246.

cording to 11 Vin. Ab. Executors (H) pl. 12 (*a*) is not bona notabilia, though assets.] In a note to *Daniel* v. *Luker*, Dyer, 305 a,—and the notes to Dyer, it is to be borne in mind, are believed to have been written by *Treby*, C. J.—it is said: "an annuity for years out of the parsonage shall be bona notabilia where the parsonage is;—adjudged." A deed is bona notabilia, only when it can be enforced by an action of debt or covenant. Thus, in *Gurney* v. *Rawlins* (*b*) it was held that a policy of insurance under seal, whereby the directors of an Insurance Company covenanted that upon the death of the assured the funds of the company should stand charged and be liable to pay to his executors a sum of money, was bona notabilia where the document was at the time of the death, and not where the company's funds then were; for, as *Parke*, B. said—"The only available property to the testator was the specialty;" the deed, as Lord Abinger observed in the course of the argument, not giving "any right of execution on the funds as funds in the hands of the directors." The reason why the deed is in such a case bona notabilia is, that the party suing on it was by the rules of pleading bound to produce it in Court. But where no such necessity existed, the instrument is not bona notabilia. Thus, in *Yeoman* v. *Bradshaw* (*c*) it was held that a bill of exchange was not bona notabilia where the document itself was; "for in pleading, it is never said 'hic in curia prolat.'" "Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in pios usus . . . . . And it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts

(*a*) Citing Went. Off. Ex. 46.
(*b*) 2 M. & W. 87, 90, 91.
(*c*) 3 Salk. 164; S. C. Carth. 373; Comb. 392; 12 Mod. 107.

due on these instruments were assets where the debtor lived, and not where the instrument was found;" *per curiam* in the *Attorney-General* v. *Bouwens* (*a*). Here the deed does not create a specialty debt, but is merely evidence of a right of entry, not in any way altering its nature; it is therefore not bona notabilia; and without letters of administration from the ordinary within whose jurisdiction the premises assigned by the mortgage deed for a term of years lies, the applicant has no title to the mortgage.

2. But even if he has a title, the Court will not enforce it by mandamus. That is only granted where a party has a legal right and no legal remedy. Here, as was said by the Court in the last case of *Pardoe* v. *Price* (*b*), "the remedy of the cestui que trust is exclusively in a Court of Equity;" or, at all events,—as the same Court said in the earlier case between the same parties,—the mortgagee's "only remedy is by enforcing his rights as mortgagor of the tolls, by bill in equity, or by determining the possession of the tolls by the trustees." If his right be merely equitable this Court will not enforce it by mandamus; if he have a legal right he can enforce it by ejectment.

Pearse, in support of the rule. The deed is bona notabilia where it was at the death of the intestate, and a York administration was therefore unnecessary. Although an action of debt or covenant will not lie upon it against the trustees, a debt is due under it; which debt, were it not that the trustees are not personally responsible (*c*), might be recovered upon a count for money paid or money lent; *Yates* v. *Aston* (*d*). It is said that this instrument resembles, for the present purpose, a lease: but there the land is the available property, or bona notabilia, and the deed is merely evidence of the lessee's right; here the only property out of which the mortgagee could pay himself if he entered into possession of the toll gates and other property comprised in the

(*a*) 4 M. & W. 171, 191.
(*b*) 16 M. & W. 451, 458.
(*c*) See 4 Geo. 4, c. 95, s. 61.
(*d*) 4 Q. B. 182.

mortgage, is the tolls, which are nullius loci. No authority is cited by *Layton* in support of the statement that mortgages for terms of years are bona notabilia where the lands lie. [He referred to *Whyte* v. *Rose* (*a*), *Ex parte Horne* (*b*), *Smith* v. *Stafford* (*c*), and *Edwards* v. *Holiday* (*d*).]

2. With respect to the remedy by mandamus, the passage cited from the judgment of the Court of Exchequer in the last case of *Pardoe* v. *Price* is a dictum merely. Here the 18th sect. of the 9 Geo. 4, c. xlvi. (*e*), gives the mortgagee a legal right; for it enacts that the trustees shall apply the tolls, among other purposes, in repaying the moneys due on the tolls, and that is a statutory right which the Court will enforce. Debt or covenant will not lie, for the trustees are exempted from personal responsibility by the 4 Geo. 4, c. 95, s. 61. And the Court will not refuse to enforce the legal right, because the mortgagee happens also to have the right of bringing ejectment to obtain possession of the mortgaged premises. If the mortgagee brought ejectment, he would be bound to account to the trustees for all the moneys received at the toll gates, and paid in keeping them in repair: the creditor, in other words, would be constituted a trustee for his debtor. It is obvious that this remedy is much less complete in its nature than a mandamus, and for that reason the writ should not be refused. In *The King* v.

(*a*) 3 Q. B. 493; S. C. 2 G. & D. 312.

(*b*) 7 B. & C. 632.

(*c*) 2 Wils. Ch. Ca. 166.

(*d*) 9 Dowl. 1023.

(*e*) By that section it is enacted "that all the money already received by virtue of the said three first recited acts" (earlier acts concerning the same road) "now hereby repealed, or any of them, and now in the treasurer's hands, shall be by the said trustees applied to the purposes of this act, and thereout, or out of the first money which shall arise or be received from the tolls by this act granted, or otherwise, the said trustees shall in the first place pay and discharge, first, the costs of the act; next, the interest of moneys due on the credit of the tolls; afterwards, in erecting turnpikes and toll-houses, in keeping the roads in repair, and otherwise putting the act in execution;" and lastly, in repaying the principal moneys now due and owing, or hereafter to be borrowed, on the credit of the tolls by the act granted.

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REGINA v. The TRUSTEES of the BALBY and WORKSOP TURNPIKE ROAD.

The St. Katherine Dock Company (*a*), the Court of Queen's Bench granted a mandamus to enforce an award against the defendants, because any action which might have been brought upon it would have been unavailing, as it must have been brought against the treasurer of the company alone, and the act of Parliament incorporating the body protected the goods of their officer from execution. The Court will grant a mandamus, although a remedy exists by indictment; *The Queen* v. *The Bristol Dock Company* (*b*). [He referred also to *Reg.* v. *The Norwich and Brandon Railway Company* (*c*), *Bogg* v. *Pearse* (*d*), and *Addison* v. *The Mayor, &c. of Preston* (*e*).]

Cur. adv. vult.

CROMPTON, J.—This was a rule for a mandamus to compel the trustees of a turnpike road to pay to the representative of the assignee of a mortgagee of turnpike toll houses and tolls, the interest due on the security.

Upon the argument before me, at the end of last Term, it was agreed that two points should be left for my decision.

The first was whether the administration had been properly taken out in the province of Canterbury, where the security in question was at the time of the intestate's death, or whether the administration should not have been taken out in York, where the road and toll-houses were situate.

The second question was whether a mandamus lay in such a case.

The deed of assignment of the tolls to the original mortgagee, which was in the form prescribed by the General Turnpike Act, 3 Geo. 4, c. 126, s. 81, contained no covenant for repayment, but was a mere conveyance of an interest in the tolls and toll-houses for the residue of the term for which the tolls had been granted by the special

(*a*) 4 B. & Ad. 360. See *Reg.* v. *The Victoria Park Company*, 1 Q. B. 288.

(*b*) 2 Q. B. 64.

(*c*) 3 D. & L. 385.

(*d*) 2 L. M. & P. 21.

(*e*) Com. Pleas, E. T. 1852, cited from 21 L. J. C. P. 146.

act, unless the principal and interest should be sooner repaid. This gave a chattel interest in the toll-houses and tolls to the mortgagee which would pass to the assignee under the statute, and to the administrator of the assignee who died intestate. Such an interest seems to me to fall within the same class as leases for years, interests under which are bona notabilia where the lands lie, and not where the instruments are at the time of the death; see *Com. Dig.* tit. "*Administrator*" (B. 4); 1 *Williams' Exors.* 179, 1st ed. I think, therefore, that administration should have been taken out in the diocese or peculiar where the road and toll-houses are situate, and that the administration taken out in Canterbury was wrong.

With regard to the second question, it must be taken, since the decision of *Pardoe* v. *Price* (*a*), that such a security as the present gives no legal right to the mortgagee to demand the payment of either the principal or the interest. It was decided in *Pardoe* v. *Price*, 16 M. & W. 458—461, that the commissioners are merely trustees for the mortgagees as to the application of the monies, which are to be applied in the order directed by the act of Parliament; and that the relation between the commissioners and the mortgagees is that of trustee and cestui que trust. The statutory provisions for the application of the money in the above case were substantially the same as those enacted by the special act in the present case; and I feel myself bound by the authority of *Pardoe* v. *Price*, which is directly in point, to hold that the applicant in the present case has no legal right but that his remedy is in equity. If so, the case seems to fall within the general rule laid down in *The King* v. *The Marquis of Stafford* (*b*), where it was held that no mandamus will lie where the right is merely equitable, and where there is no legal right.

I say the "general rule," because I find that in *Edwards*

(*a*) 16 M. & W. 451. (*b*) 3 T. R. 646, 651.

v. *Lowndes* (*a*), where an action on the case had been brought against trustees under circumstances very similar to those in the present case, it was said by Lord *Campbell*, C. J. in delivering the judgment of the Court, that "the proper remedy in such a case would be in equity; or, *if there is any remedy at law, it might under some circumstances be by mandamus;* but not by action." Taking the general rule, however, to be as stated in *The King* v. *The Marquis of Stafford* (*b*), and finding no particular circumstances to take the case out of the general rule, even if a mandamus can ever lie where there is no legal right,—the present facts shewing the case to be one peculiarly for equitable relief,—I must apply the general rule to this case.

On both grounds, therefore, my opinion is against the applicant. Rule discharged on terms agreed to by the parties. Rule discharged.

(*a*) 1 Ell. & Bl. 81, 92. (*b*) 3 T. R. 646, 651.

January 27.

FARTHING *v.* CASTLES.

Coram *Erle, J.*

Where the defendant gives the plaintiff twenty days' notice to proceed to trial, under the 101st section of the Common Law Procedure Act, the plaintiff may at once apply to the Court for an extension of time, without waiting until the suggestion that he has failed to proceed, although duly required, has been entered.

THIS was a rule calling on the defendant to shew cause why he should not be restrained from taking any further proceedings in the cause, or why the time for proceeding to trial should not be extended.

The action was brought to recover 8*l.* The defendant suffered judgment to go by default as to all except 1*l.* 4*s.*, as to which he pleaded payment into Court; but he did not pay the money into Court. After issue joined he left this country, and his mother agreed to pay the debt by instalments, most of which were paid, when, eighteen months after issue joined, the defendant's attorney served the plaintiff under the 101st section of the Common Law Procedure Act, 1852, with a twenty days' notice to proceed to trial.

D. D. Keane shewed cause. This application has been misconceived and is premature. The 101st section of the Common Law Procedure Act (15 & 16 Vict. c. 76), enacts, in substance, that when the plaintiff neglects to proceed to trial in time, the defendant may give twenty days' notice to the plaintiff to bring the issue to trial at the sittings or assizes, as the case may be; and that if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the notice given by the defendant, the latter may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do, (which suggestion shall not be traversable, but only subject to be set aside if untrue), and may sign judgment for his costs; provided that the Court or a Judge shall have power to extend the time for proceeding to trial with or without terms. There is obviously nothing in the first part of the section to authorize the Court to stay proceedings, as asked by the first branch of the rule. The object of the enactment, on the contrary, is to bring the cause to trial; and the defendant has taken the regular course for that purpose. That part of the rule, therefore, which asks a stay of proceedings is altogether misconceived. With respect to the alternative,—that the time should be extended,—the application is premature. The plaintiff will not be aggrieved until the suggestion is entered, and he ought to have waited till the defendant had taken that step. At all events, the rule ought to have stated the length of time required instead of asking for an indefinite extension.

Hance, in support of the rule, in answer to a question from the Court, asked for twelve months' time, and was then stopped.

ERLE, J.—I am of opinion against Mr. *Keane* upon the meaning of the statute. I think this is a very proper case for staying proceedings; and I should have stayed them absolutely if I had had evidence that the defendant's

mother had his authority when she settled the action. The effect of the statute, duly construed, is that when the defendant takes a step to force the plaintiff on, the latter may come to ask for an extension of time. Under the present circumstances, I think it reasonable to give him twelve months.

Rule accordingly.

January 29.

REGINA *v.* HARWOOD, Esq.

Coram *Erle, J.*

The right of parties to actions for more than 5*l.* in the County Court to a trial by jury is not limited to the original trial of the cause, but extends to every subsequent trial.

The judge of a County Court refused to try by jury, at the second trial, a cause which had been originally tried by himself without a jury, assigning as the ground for his refusal, that in granting a new trial, he had not given leave to the parties to have a jury.

THIS was a rule for a mandamus to the judge of the County Court of Kent, held at Margate, commanding him to try by a jury a cause of *Nutting* v. *Nutting*.

The following facts appeared upon the affidavits in support of the rule. The action was brought to recover 30*l.* for money had and received, and came on for trial at Margate before the judge, without a jury, in July, 1852; when judgment was given for the defendant. A new trial was subsequently granted; and both parties agreed that the second trial should take place before a jury. When the cause was called on for the second trial, the judge declined to try it by a jury, on the ground that he had not given leave that it should be so tried; and he struck the case out of the paper. It appeared that the sheriff of the county of Kent did not summon juries from the Cinque Ports (within which jurisdiction Margate is situated), and consequently, that he did not "cause to be delivered to the clerk of the (County) Court a list of persons qualified and liable to

Upon shewing cause to a rule for a mandamus commanding him to try the cause by jury, he relied on this objection, and also contended that no sufficient jury had been summoned.

The Court held the first objection bad, and, declining to decide the second, made the rule absolute.

serve as jurors in the Courts of Assize and Nisi Prius, for their County," as directed by the 72nd sect. of the 9 & 10 Vict. c. 95. It was, under these circumstances, the practice of the Margate County Court to summon juries from the list of the special juries of Dover, and with the view of obviating objections by the parties to the jury so summoned, to require the written consent of the parties to have the cause tried by such jury.

Montagu Chambers and *H. A. Simon* shewed cause. The 89th sect. of the 9 & 10 Vict. c. 95 enacts, among other things, that the judge shall have power "to order a new trial to be had upon such terms as he shall think reasonable." Here the first trial was had without a jury; and as none was demanded when a new trial was granted, the presumption was that the second trial would take place in the same manner as the first. It was such a "reasonable term" as the judge might have imposed: and it must be taken, from the absence of all mention by the judge of a jury upon the motion for a new trial, that such a term was impliedly imposed. His conduct in refusing to try by a jury on the second occasion shews that in his opinion that term had been impliedly annexed to the order for a new trial.

[They also argued that there was no fit jury to try the cause; but the argument is omitted, as the Court pronounced no opinion on the point.]

Lush in support of the rule. The 70th sect. (*a*) gives either party a right to a trial by jury where the amount claimed exceeds 5*l*. The language of the 20th rule of "the practice rules and forms" which were framed under the 78th sect. of the 9 & 10 Vict. c. 95, inadvertently limited this right to the first trial, as it required that the notice of

(*a*) It enacts, "that in all actions where the amount claimed shall exceed five pounds it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action," &c.

a demand of a jury should be made two days "before the return of the summons"(*a*); but the 79th of the rules of practice made in pursuance of 12 & 13 Vict. c. 101, s. 12, (which repeal the first rules), is so worded as to leave the parties the right to a jury on any subsequent trial as well as on the first,—the notice being required to be served two clear days "before the day of hearing." The 80th rule also appears to recognize this right to its fullest extent: for it provides that "where notice of a demand of a jury has not been given in due time, or if at the hearing, both parties desire to try by a jury, the judge may, in such terms as he shall think fit, adjourn the cause in order that necessary steps for such trial may be taken, and the trial shall take place accordingly." Even, therefore, if the objection to the competency of the jury, which is now raised for the first time had been mentioned when the cause came on for trial, and the judge had thought it well founded, it would have been his duty to postpone the trial until proper steps were taken to procure the attendance of a jury.

[He contended also that the jury summoned were competent to try.]

ERLE, J.—The only point taken by the judge was that he had power to refuse to try the cause by jury: and on that point I am against him. I think that the parties had a right to have a jury on the second trial; and that as that was their right, it was the duty of the judge to postpone the trial, if necessary, until a jury was procured. As to whether the jury which was summoned was a fit jury to try the cause, I do not think it necessary to give any opinion at present. If the object be well founded, it will be open to the judge to avail himself of it when he makes a return.

Rule absolute.

(*a*) *Lush* here referred to *Sparrow* v. *Reed*, 5 D. & L. 633, where the effect of the rule was discussed.

ANSETT *v.* MARSHALL and ANOTHER. *January* 31.

Coram *Crompton, J.*

A party bonâ fide and properly detained in England to give evidence upon the trial is entitled, on taxation, to the expense of his subsistence, although not a seafaring man.

Plaintiff, a resident in England, and not a seafaring man, took a passage on board defendants' ship, but was wrongfully turned out. They then offered him a passage in another ship, but he refused, and brought assumpsit for not carrying him pursuant to contract. No special damage was laid in the declaration. Plaintiff

THIS was a rule calling on the defendants to shew cause why the Master's taxation should not be reviewed.

The following facts appeared upon the affidavits. The plaintiff, a general dealer, residing in this country, took a steerage passage from London to Australia on board the Washington Irving, a vessel belonging to the defendants, and paid the whole of his passage money. By some accident no mention of this last fact was entered in the defendants' books, and one of their clerks conceiving that the plaintiff had not paid for his passage, dispatched a telegraphic message to the captain of the ship, directing him to demand payment, and in default, to turn the plaintiff out of the vessel. The message reached the captain at Deal, on the 7th of September, and as the plaintiff refused to comply with the demand, he was put on shore at that place. The defendants, upon discovering the error of their clerk, offered the plaintiff a cabin passage in another vessel which was to sail, and which did sail on the 14th, and to pay all expenses incurred by him since his expulsion, together with the further sum of 5*l.*; and they also wrote to the captain of the Washington Irving, informing him of the true state of facts, which they required him to communicate

remained in England till the cause was in the paper for trial, when a verdict for 40*l.* was taken by consent. Upon taxation plaintiff claimed 30*l.* for the expense of his subsistence between the writ and verdict, which the Master refused, on the ground that plaintiff was not a seafaring man, and also that the expenses in question were covered by the damages.

Held, on motion to review the Master's taxation,

1. That the rule allowing subsistence money to witnesses detained in this country to give evidence was not limited to seafaring persons.

2. That the expenses of plaintiff's keep were not covered by the damages in the action, as these could only include compensation for the loss sustained between plaintiff's expulsion from the first vessel and the sailing of the one in which he had been offered a berth; and,

3. That plaintiff was entitled to the cost of his keep from the time of issuing the writ to the verdict, if the Master should find that he had been bonâ fide detained as a witness, and that it was proper that he should be so detained.

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to the passengers. The plaintiff refused to accept the terms offered, and on the 11th of September commenced an action against the defendants. The declaration was in assumpsit for not carrying him in pursuance of their contract. No special damage was stated. The defendants pleaded merely non assumpsit. Both before and after the commencement of the action a correspondence took place between the defendants and the plaintiff and his attorney, in the course of which the former clearly admitted their liability to him in respect of this transaction. The plaintiff, however, remained in this country until the cause was in the paper for trial, which was on the 17th of December; and then it was agreed, before the case was called on, that the plaintiff should have a verdict for 40*l.*, undertaking that no further action should be brought. Upon the taxation of costs, the sum of 30*l.* was claimed for the plaintiff's maintenance in this country from the 7th of September to the 17th of December, which the Master refused, on the ground that he was not a seafaring man, and also that the expense of his maintenance was covered by the damages.

Prentice shewed cause. The expense of the plaintiff's maintenance was taken into calculation when the verdict for 40*l.* was offered and accepted. [*Crompton*, J.—It is clear he could not have recovered more than his expenses for the few days which intervened between his being turned out of the first ship and the sailing of the vessel in which the defendants offered him a passage. His case is that he was damnified from the time when he was turned out until he could have got another passage: but what he now claims is the expense which he incurred in staying in this country to recover the damages for the loss he thus sustained. The only question, it seems to me, is whether he stayed in the country bonâ fide for the cause, or merely to make costs.] His evidence was unnecessary: the only plea was non assumpsit, which was pleaded only to avoid a writ of inquiry; and the defendants' letters were

ample proof of the contract. At all events, he ought to have been examined on interrogatories, if his evidence was thought necessary: for that is the course which should be resorted to in all cases except where the action involves some impeachment on the witness' character; in which case, indeed, he would be entitled to remain in the country until the trial, in order to meet the charge in the witness box. [He referred to *Evans* v. *Watson* (*a*)].

But further, the rule which allows the expense of a witness' maintenance has always been limited to seafaring men: and it would be very inconvenient to extend it to others. The consequence of such extension would be frequent fraudulent representations by witnesses that they were about to leave the country, made expressly for the purpose of obtaining subsistence money. At all events, the matter was altogether for the consideration of the Master; and the Court will not interfere with the discretion which he has exercised.

Pulling, in support of the rule. Whether the subject be one for the Master's discretion or not, the cases of *Lonergan* v. *The Royal Exchange Assurance Company* (*a*), *Schimmel* v. *Lousada* (*b*), and *Sturdy* v. *Andrews* (*c*), shew that the Court will interfere. [*Crompton*, J.—The rule is that if the Master acts on a wrong principle, the Court interferes; if he acts on a right principle the Court does not interfere with the discretion which he has exercised in the particular case. If the Master disallowed the plaintiff's expenses on the ground that he was not a seafaring person, that is a question of principle: if he decided on the ground that he was an unnecessary witness, his decision would be final.] The Master acted on the ground that the expenses in question had been recovered as damages, and also that the plaintiff was not a seafaring man. The first ground is clearly untenable, as already pointed out by the

(*a*) 3 C. B. 327; S. C. 4 D. & L. 193.
(*b*) 7 Bing. 725; 1 Dowl. 223; 5 M. & P. 805. See also p. 447.
(*c*) 4 Taunt, 695.
(*d*) 4 Taunt. 697.

Court: and the latter is a question of principle and one, therefore, upon which the Court will interfere. [He was then stopped by the Court.]

CROMPTON, J.—In the view which I take of this case, I think it better that it should go back to the Master to consider whether the plaintiff was a necessary witness to be kept in this country for the trial of the cause. When we held, in *Howes* v. *Barber* (*a*), that a party might be allowed the expenses of his keep as well as any other witness, we intimated that he ought not to be allowed them where his attendance at the trial was not necessary as a witness, and where, consequently, costs would be unnecessarily thrown on the other side (*b*); and I am prepared to act on that view. I do not think that the question whether the plaintiff's expenses were included in the damages can be taken into consideration by the Master in exercising his discretion; because it is clear that the damages recovered are not compensation for the damage sustained up to the time of trial, but only for that sustained up to the time when the plaintiff might have sailed in another ship. With respect to the Master's decision that the rule which allows a witness the expense of his subsistence applies only to seafaring persons, it is my strong impression,—and I think that the opinion of the full Court, when this rule was granted (*c*), was equally strong,—that the rule cannot be so limited. I can see no reason, upon principle for limiting it to seafaring men. If a landsman about

(*a*) Q. B. T. T. 1852, cited from 21 L. J. Q. B. 254.

(*b*) "We must trust to the intelligence and the vigilance of the taxing officers to detect and to frustrate attempts that may be made to swell costs unnecessarily, under the pretext that the parties were material and necessary witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses, and if it appear that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected;" *per cur.* 21 L. J. Q. B. 256.

(*c*) The rule nisi had been obtained in this Term in the full Court, where *Crompton*, J., was then sitting.

to leave England were detained in this country in order to give evidence in an action to which he was not a party, it would be quite as hard that he should not be entitled to be paid for his keep, as that a seafaring man should not be entitled to it. The circumstances of the case and the situation of the party must be taken into consideration by the Master. He must inquire whether the plaintiff was a necessary witness, and whether his evidence might not have been taken on interrogatories: and in considering this last question, he may have to consider whether the case was one of personal outrage or upon imputation of character, or the like, as in such case the plaintiff might be justified in staying for the trial. All these matters, however, are for the Master's consideration; and as they were not brought before him, I think the case should go back to him in order that he may see whether the plaintiff was bonâ fide kept here for the cause, and whether he was a proper witness:—I do not mean that he was absolutely necessary, but that he was a proper person to be kept as a witness.

Rule absolute, that the Master should inquire whether the plaintiff was bonâ fide detained in England as a witness, and whether it was reasonable, under the circumstances, that he should be so detained.

HUMPHREYS *v.* SMITH.

January 31.

Coram *Crompton, J.*

THIS was a rule, calling on Edward Humphreys and Edward Hurst to shew cause why a warrant of attorney and

An insolvent is entitled to the benefit of the act, within the meaning of the 1 & 2 Vict. c. 110, immediately upon adjudication, and not merely from the expiration of the period for which he is remanded.

Therefore, a warrant of attorney to secure payment of the old debt, given before discharge from custody but after adjudication, by an insolvent who has petitioned under the 1 & 2 Vict. c. 110, to his sole detaining creditor, is void ab initio, and the Court will, upon the insolvent's application, set it aside, even before the period of remand has expired.

defeazance thereon given to them by William Ackers Smith should not be set aside.

Smith, in September 1851, being in prison for debt at the suit of Humphreys and Hurst, and of other creditors, petitioned the Insolvent Debtors' Court, under the 1 & 2 Vict. c. 110, for discharge from custody. The vesting order was made on the 26th of the same month; and on the 18th of December, the commissioner adjudged that the prisoner should be discharged from custody and entitled to the benefit of the act, as to other debts, at different periods which had now elapsed; and (acting under the 78th section of the 1 & 2 Vict. c. 110) that as to the debt due to Humphreys and Hurst, he should be discharged and entitled to the benefit of the act as soon as he should have been in custody at their suit for twenty calendar months from the date of the vesting order: which period would not expire until the 26th of May 1853. On the 18th of October 1852, being in custody solely in respect of the debt due to Humphreys and Hurst, he agreed to give them a warrant of attorney for securing to them the payment of 30*l.* by three instalments, in January, April and July respectively, and he accordingly executed the warrant of attorney in question and was thereupon discharged.

J. Brown shewed cause. 1. This application is premature. It is made under the 91st section of the 1 & 2 Vict. c. 110, which enacts that "after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid," no execution shall issue in any judgment obtained against him for any debt in respect to which he shall have become so entitled, "nor in any action upon any new contract or security for payment thereof," except upon the judgment entered up in the name of the assignee; and it provides that "if any suit or action shall be brought or any *scire facias* be issued against" the insolvent "for any such debt," "or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person

for the same," he may plead that he was discharged by the order of adjudication. It is here necessary to determine the meaning of the words "after any person shall have become entitled to the benefit of this act." The 78th section, under which the commissioner acted in respect to the debt in question, provides that in any of the cases mentioned in the section, the commissioner may "adjudge that such prisoner shall be so discharged, and so entitled as aforesaid, so soon as he shall have been in custody, at the suit of the person or persons who shall be creditor or creditors for the same respectively, for a period not exceeding two years," &c.: and by the 85th section, the insolvent who is "so discharged, and so entitled as aforesaid," at a future period, is "subject and liable to be detained in prison, and to be arrested and charged in custody" by the creditor in respect of whose debts such adjudication is made. It appears, therefore, that a prisoner is not entitled to the benefit of the act until the time to which his discharge is postponed has arrived. That time has not yet arrived in this case: for although he is in fact out of custody, he has been discharged by the consent of his creditors, and not under the act. If he were now sued upon the judgment, he could not plead the defence given by the 91st section, because it is not true that he now stands discharged by the order of adjudication: for although now discharged, he will not be entitled to the benefit of the act until the 26th of next May. It follows that he is not entitled to the benefit of any of its provisions; and the warrant of attorney sought to be set aside can not, at present at least, be impeached. It might indeed be contended that the security is perfectly valid. There are two classes of contracts by insolvents which are illegal: first, where the contract is entered into to buy off the opposition of a creditor; and secondly, where it is a new security for the whole, or a portion of a debt in the schedule. In *Hall* v. *Dyson* (*a*), a promise to pay a sum of money in

(*a*) Q. B. Hil. T. 1852, cited from 21 L. J. Q. B. 224.

consideration of the withdrawal of a threatened opposition was held illegal on the ground that, after giving notice of his intention to oppose, the creditor was morally bound to prosecute, as he had led the other creditors to believe that he would go on, and that the case would be properly adjudicated upon by the Court; and as by his withdrawal they were injured and justice was defeated. *Murray* v. *Reeves*(*a*) was decided upon the same principle. But those cases do not apply here, where the parties who took the security were at the time the sole detaining creditors, and had no duty, legal or moral, to perform towards other creditors. It is true, this is a security for an old debt, and may be said to fall within the second class; but it is distinguishable in the circumstance already adverted to, that the new security was given at a time when the insolvent was not entitled to the benefit of the act; and if it be valid when he gave it, it may be doubted whether it will not continue valid even after the expiration of the term of imprisonment.

2. But further, even if the instrument were now invalid the Court would not set it aside. The act has not declared the contract wholly null and void, but has merely enacted (section 91) that if any action shall be brought upon it, the defendant may plead his discharge under the order of adjudication.

Lush, in support of the rule. 1. The security was illegal and void from the moment that it was given. Whether given to buy off opposition, or in consideration of the old debt, a security is equally void; because, in both cases, against the policy of the insolvent laws. That policy is, that the future, as well as the present property of the insolvent shall be distributed equally among all his creditors; for which purpose a warrant of attorney is executed to the assignee. But any security, whether given to buy off opposition, or to secure an old debt, would equally defeat

(*a*) 8 B. & C. 421.

the object of the act, and is therefore equally invalid. The case of *Ashley* v. *Killick* (*a*) is in point. There, an insolvent, during his remand at the suit of a particular creditor, gave that creditor his acceptance for a part of the old debt, and gave the creditor's attorney an I. O. U. for his costs; and the Court held that neither instrument could be enforced. "The act of Parliament," observed Lord *Abinger*, "says that no new security given by an insolvent after he has been declared entitled to the benefit of the act, for the old debt, shall be enforced against him." It is said, on the other side, that the debtor in the present case is not entitled to the benefit of the act: but that is a fallacy. The insolvent becomes entitled to the benefit of the act immediately upon the adjudication, although he may not be entitled to the immediate enjoyment of his liberty under it. The adjudication gives him the benefit of the act, whether he be let out of prison or not. The language of the 90th section of the 1 & 2 Vict. c. 110, which speaks of persons "who shall have become entitled to the benefit of this act by any such adjudication as aforesaid," is inconsistent with any other view. "The act," says *Parke*, B. in the case just cited, "does not speak of new contracts or securities given after the *discharge* of the party, but after he has become entitled to the benefit of the act." So, in *Ex parte Hart* (*b*), *Wightman*, J. observes in the course of the argument: "Is not the effect of the remand that the insolvent is discharged, subject to the imprisonment ordered?"

2. If the security be illegal and void, the Court will set it aside. The objection now made to that course was also raised in *Ex parte Hart* (*b*), where a rule to set aside a warrant of attorney given by an insolvent after adjudication, was made absolute by *Wightman*, J. [He was then stopped by the Court.]

(*a*) 5 M. & W. 509, 512.

(*b*) 14 L. J. Q. B. 92; S. C. 2 D. & L., 778, where, however, the observation quoted is not reported.

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CROMPTON, J.—That case is distinctly in point. It shews that the Court will interfere, and set aside a warrant of attorney given under such circumstances as the present. If any authority were wanted, the cases shew that such a security as this given after adjudication is within the act and invalid. The observation of *Wightman*, J. in *Ex parte Hart*(*a*) appears to me to put the case on the right ground; viz.: that the insolvent is discharged by the adjudication, but is nevertheless subject to the imprisonment ordered:—an observation entirely consistent with what *Parke*, B. says in *Ashley* v. *Killick*(*b*), viz.: that "the act does not speak of new contracts or securities given after the *discharge* of the party, but after he has become entitled to the benefit of the act." Here, then, the debtor has been discharged, and is entitled to the benefit of the act. The security, therefore, is void and must be set aside. The authorities are so strong that I do not think it necessary to take further time to consider the question. I think this rule must be made absolute.

Rule absolute.

(*a*) 14 L. J. Q. B. 93. (*b*) 5 M. & W. 512.

January 27. *February* 11.

REGINA *v.* The JUSTICES OF MIDDLESEX.

Coram *Erle, J.*

By the 3 & 4 Wm. 4, c. 90, the "ratepayers" of a parish may hold a meeting for determining whether they shall adopt the provisions of that act (for lighting and watching); and such person as may be elected by the ratepayers present shall preside as chairman at such meetings, and has power to decide questions as to the right to vote; but he has no casting vote. If they do adopt the act, they are to hold annual meetings for voting money for current expenses, &c.

Held, that resolutions by the ratepayers to adopt the act, and subsequently, to raise money for the current expenses, were valid and legally binding, although the chairman of the meetings at which they were passed was not a ratepayer.

Semble, that no person is competent to be chairman of such meetings who is not a ratepayer.

THIS was a rule calling upon certain justices of the peace for the county of Middlesex, and a Mr. Sharp and three other persons, to shew cause why the justices should not make an order to enforce payment by those persons of the sums assessed upon them respectively by a rate made

on the 24th of October 1851, for the purposes of the 3 & 4 Wm. 4, c. 90.

The following facts appeared upon the affidavits. In September 1851, the ratepayers of the part of the parish of South Mims, which is comprised in the town of Barnet, at a meeting for the purpose, resolved upon adopting in that part of the parish so much of the provisions of the 3 & 4 Wm. 4, c. 90, (for the lighting and watching of parishes in England and Wales), as related to lighting. On the 24th of October, 1852, a meeting was convened by the churchwardens, under the 18th sect. of the act, for the production of the inspectors' accounts and vouchers, and for the election of inspectors, and determining the amount of money to be raised for the current year. At both of these meetings, the Rev. William Reed, a clergyman who was officiating in the parish in the absence of the vicar, but who was not a ratepayer, was elected chairman. In the course of the last meeting, it was proposed that a sum should be raised for the current year: when the votes of Sharp and the other persons named in the rule, who were ratepayers, were rejected by the chairman, on the ground that they had not paid the lighting rate of the preceding year. The resolution was carried, and the rate was accordingly made, allowed and published. Sharp and the others refused to pay it; and having been summoned before the justices who were now called upon to shew cause against the rule, these refused to make an order to enforce payment of the rate, on the ground that the meeting at which it was made was not not duly constituted, the chairman not being a ratepayer.

Huddleston shewed cause. The question is whether the meeting of the 24th of October was legal; and it is submitted that it was not, as the chairman was not a ratepayer. The 5th sect. of the 3 & 4 Wm. 4, c. 90, empowers the churchwardens of any parish to call a meeting of the ratepayers to determine whether the act shall be adopted:

and the 6th sect. provides that "such person as may be elected by the ratepayers present shall preside as chairman at such meetings," and gives him power to decide all questions as to the right of voting, &c. The 9th sect. then enacts, among other things, that "the ratepayers" shall "in every succeeding year at a meeting to be called for that purpose in manner herein directed," fix the amount which the inspectors shall have power to call for in any one year; and the 18th requires the churchwardens to give notice that "a meeting of the ratepayers" will be held at a certain time, and place, for the production of the inspectors' accounts and vouchers, for the election of inspectors, and for determining the amount to be raised for the purposes of the act for the current year;—at which meeting the chairman has, by the 20th sect., the same power of deciding the right to vote, as at the meeting held under the 5th sect. It appears from these sections that the annual meetings are to be constituted in the same manner as the meeting which is held to consider whether the act shall be adopted; that is, it must be a meeting of ratepayers, and of ratepayers alone. The chairman, therefore, as he is a member of the meeting, must be a ratepayer; and as he was not so in this case, the meeting was not constituted as the act directs. If the justices had issued a distress warrant against the parties who had refused to pay a rate made at such a meeting, and their goods had been seized, the justices would have been subject to an action of trespass; *Wilkinson* v. *Gray* (*a*), and *Beechey* v. *Quentery* (*b*).

Petersdorff, in support of the rule. The act requires no qualification for the chairman of the yearly meetings: the provision respecting the election of a chairman, (the 6th sect.) relates only to the preliminary meeting held for the purpose of considering the expediency of adopting the act, and not to the yearly meetings which are held after its provisions have

(*a*) Cited from the 9th vol. of the *Justice of the Peace*, p. 71.

(*b*) 10 M. & W. 65.

been adopted. [*Erle*, J.—If the act gave the chairman a casting vote, there would be strong ground for contending that he should be a ratepayer; but even without such a clause, it is difficult to say that he ought not to be a ratepayer. The meeting is to be of "ratepayers," and they are to choose a chairman. That chairman must be somebody present at the meeting; and, to be present, he ought to be a ratepayer.] The duties of a chairman require a certain amount of education, which it is possible, although not now-a-days probable, that none of the parishioners might possess; and the act would seem to have left them at liberty to elect a suitable person, even though not one of their own body.

Cur. adv. vult.

ERLE, J.—In this case the main question was, whether the resolution of the requisite majority of the ratepayers adopting the act of 3 & 4 Wm. 4, c. 90, and fixing the amount to be levied by a lighting rate became inoperative, because the chairman, who presided at a meeting of ratepayers, was not a ratepayer. As the meeting, according to the words of the statute, is to be of the ratepayers, I incline to think that a person who was not a ratepayer had no right to be at the meeting, and, by consequence, no right to be chairman. But even if this be conceded to be the effect of the statute, still I am of opinion that the resolution of the requisite majority of ratepayers would not be rendered inoperative thereby. The essential fact is the vote of the ratepayers. In case a poll is demanded, the only matter to be scrutinised is the voting of the ratepayers; and as the chairman does not vote, and as there is no suggestion that the votes of the ratepayers were not properly taken at the meeting in the first year, it seems to me to follow, that the resolutions in the first year adopting the act and fixing the amount to be paid, became legally binding.

The question now before me arises in respect of a resolution of a meeting of the ratepayers held under the same

chairman, subject to the same objection in the second year, fixing the amount to be paid for that year; and for the reason before given in respect of the meeting in the first year, I am of opinion that this resolution also was legally binding, notwithstanding the objection in respect of the chairman.

It follows that the votes of the defendants were properly refused at the second meeting, they not having paid the lighting rate of the former year. Such lighting rate under this statute was, in my judgment, within the section (*a*) disqualifying a ratepayer who has not paid all parochial rates, taxes, and assessments.

For the reasons above stated it is my duty to make this rule absolute.

Rule absolute.

(*a*) The 14th.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Easter Term.

IN THE SIXTEENTH YEAR OF THE REIGN OF VICTORIA

The Judge who usually sat in the Bail Court in this Term, was COLERIDGE, J.

Bail Court.
1853.

April 22.

DOE dem. MAYO *v.* CANNELL.

Coram *Coleridge, J.*

Three years after an award was held bad, the party in whose favour it had been made applied to the Court to remit to the arbitrator the matters referred, without giving any explanation for the delay in applying. *Held*, too late.

BUTT moved for a rule calling on the defendant to shew cause why the time for making an award in this case should not be enlarged to the first day of Michaelmas term next; and why the matter which had been referred to the arbitrator should not be referred back to him, in order that he might amend his award, or make a new award.

The following facts appeared upon the affidavits. The action, which was brought to recover land in the county of Norfolk, was, on the 17th of July, 1847, referred by a Judge's order, which, among other things, gave the Court power to refer back to the arbitrator the matters thereby referred to him; in which case the arbitrator was to have power to amend his award, or to make a new award within

such time as the Court might direct. The award was made in July, 1848, and the order of reference was made a rule of Court in February, 1849. In the month of April following, the costs were taxed at 105*l.* In Michaelmas term, 1849, the lessors of the plaintiff obtained a rule calling on the defendant to shew cause why he should not pay these costs; but upon shewing cause, in January, 1850, before *Wightman*, J., the defendant disputed the validity of the award, on the grounds of excess of authority, ambiguity, and want of finality; and the learned Judge, holding the objections well founded, discharged the rule. Nothing further was done by the lessors of the plaintiff from that time to the present, and the affidavits did not give any explanation of the cause of the delay.

Butt. That the Court has power to enlarge the time for making an award after the time limited by the order of reference has expired, was decided by *Wightman*, J., in this Court, in the case of *Browne* v. *Collyer* (*a*). It has also been held that the power of remitting the award to the arbitrator is not confined to cases where an application is made to set it aside, but that it may be exercised upon the application of the party in whose favour it is made, and who does not seek to set it aside.

Coleridge, J.—I think you are not entitled to a rule; for you have not given the slightest explanation for a delay of more than three years. The defendant might now be put in position of great difficulty, owing wholly to the lessor of the plaintiff's delay. He may now be in very different condition; for instance, he may not be in a position to produce his witnesses. After suffering three years to elapse without doing anything, the lessors of the plaintiff are not entitled to come and, without offering any explanation of the delay, to ask the Court to interfere in this way.

Rule refused.

(*a*) 2 L. M. & P. 470.

April 23.

Ex parte LEGGE.

Coram *Coleridge, J.*

A bankrupt having made, upon his examination, an improbable statement respecting his going to Southampton and disposing of part of his property there, was committed. Upon being brought up again before the commissioner, he admitted that a portion of his former statement was false; but as to the remainder of his examination, he said that there was nothing which he could remember to correct, but he wished to do so. The commissioner thereupon asked him what were his intentions in going to Southampton, to which he answered: "to rest, and arrange with his creditors." The commissioner expressed his dissatisfaction with the answer, pointing out the incredibility of it, and then reiterated the question. The bankrupt, in substance, adhered to his former reply, and the commissioner committed him, on the ground that he had not answered to the satisfaction of the Court.

Held, that he was warranted in so doing, under the 12 & 13 Vict. c. 106, s. 260.

THIS was a rule for a habeas corpus to bring up Joseph Legge, a prisoner in the Queen's prison, for his discharge from custody.

The following facts appeared upon the affidavits. The applicant, being a bankrupt, was brought up on the 4th of April, before Mr. Fane, one of the Commissioners of the Court of Bankruptcy, to be examined under the 117th section of the 12 & 13 Vict. c. 106 (*a*). In reply to questions then put to him respecting the disposal of some of his property, he stated that shortly before his bankruptcy he had gone to Southampton, and that he had placed the property in question, and all his books and papers, in the hands of a Mr. Marshall, who was no relation of his. He also said that he did not know where Marshall lived, and he alleged at one time that he had deposited the property with

(*a*) 12 & 13 Vict. c. 106, s. 117. "That the Court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed by the Court (having no lawful impediment made known to and allowed by the Court at such time), it shall be lawful for the Court, by warrant, to authorize and direct any person or persons the Court shall think fit to apprehend and arrest such bankrupt, and bring him before the Court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the Court, it shall be lawful for the Court to examine such bankrupt after he shall have made and signed the declaration contained in the Schedule W. to this act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers to writing, which examination so reduced into writing the said bankrupt shall sign and subscribe."

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him to secure the repayment of 68*l.*, and at another for the benefit of his, the bankrupt's, creditors. The Commissioner, not believing this account, committed the bankrupt to the Queen's prison, under the 260th sect. of the act above mentioned, for "not fully answering to the satisfaction of the Court" (*a*). On the 9th of April the prisoner was again brought up, when the following examination took place:—

Q. Do you adhere to the statement you made in your former examination? *A.* No. *Q.* In what respect do you wish to depart from them? *A.* That Marshall is a relation of mine; he is my father; he has all the property I have deposited with him at Southampton, at 4, York Terrace, New Town, Southampton. That is the only thing that I can remember in my examination that I can correct. I wish to correct others, but cannot remember them. *Q.* Who took the house at Southampton? *A.* Marshall Legge, the person I have before spoken of as Marshall. *Q.* Where are the account books relating to your business? *A.* The

(*a*) 12 & 13 Vict. c. 106, s. 260. "That if any bankrupt, or the wife of any bankrupt, shall refuse to make and sign the declaration contained in the Schedule W. to this act annexed, or if any other person shall refuse to be sworn, or shall refuse to answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court, or shall refuse to sign and subscribe his examination when reduced into writing (not having any lawful objection allowed by the Court), or shall not produce any books, papers, deeds, and writings, or other documents in his custody or power relating to any of the matters under inquiry, which such bankrupt, wife of the bankrupt, or person is required by the Court to produce, and to the production of which he shall not state any objection allowed by the Court, it shall be lawful for the Court, by warrant, to commit such bankrupt, wife of such bankrupt, or other person, in London, to the Queen's Prison, or in the country to such prison as such Court shall think fit, (as the case may be in London or in any district in the country), there to remain without bail until he shall submit himself to such Court to be sworn, and full answers make to the satisfaction of such Court to all such lawful questions as shall be put by the Court, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents in his custody or power, to the production of which no such objection as aforesaid has been allowed."

memorandums and papers were at Southampton, at York Place. When I left, they were in a desk, and all the books there, except a pocket book and banker's book. *Q.* What were your intentions when you went to Southampton? *A.* To rest for a short time, and to make arrangements for the benefit of my creditors. *Q.* I am not satisfied with that last answer, because it is impossible to believe that you went to Southampton and put your goods into the hands of your father—your father assuming a false name—with any intention to benefit your creditors. I therefore call upon you again to state what your real intentions were? *A.* The sole motive I had in placing the goods there, or one of the motives, was to preserve them for the benefit of my creditors at a future time. As soon as I had recovered myself—as I was very ill at the time—I intended to see them, to make them an offer, and throw myself on their mercy. I had this motive also, which was to prevent one or two creditors coming in and sweeping off what there was, and thus depriving the whole remainder of the benefit of them. That was my motive. I also wished to prevent an execution coming in, as I had been threatened by the holder of a 50*l.* bill.

The Commissioner, being dissatisfied with these replies, again committed the bankrupt.

Lush shewed cause. The Commissioner had authority to commit the bankrupt, because his answers were unsatisfactory to him. *Ex parte Nowlan* (*a*) seems to be expressly in point. There, as in the present case, it was contended that if the answers of the bankrupt were direct and explicit they were necessarily satisfactory, although untrue. But Lord *Kenyon* said, "There are no technical rules by which cases of this kind are determined, but the question in each particular case is, whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person." "It has been contended on behalf of this person that the answers he gave must now be taken to be

(*a*) 6 T. R. 118.

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satisfactory, because if they be not true he may be indicted for perjury: but how can an indictment for perjury against him be supported when the secret remains locked up within his own breast? The creditors are not at present furnished with any materials to support such an indictment." "It would be a ridiculous ceremony," observed *Ashurst*, J. "for the Commissioners to go through in examining a bankrupt, if they were doomed to give credit to his account however improbable or absurd it might be, merely because he has the effrontery to swear to it." It may be said that a bankrupt might be imprisoned for life if he persisted in an improbable story. That objection was urged in *Ex parte Lord* (*a*), where the bankrupt had been committed because the Commissioners did not believe his statement that a sum of money, respecting which he was required to give an account, had been stolen by housebreakers; but the Court nevertheless refused to discharge him, as they thought his answers were not such as to satisfy a reasonable person of their truth. *Parke*, B., said, "If we think the Commissioner exercised a sound discretion in disbelieving the bankrupt's story, we ought to leave him where he is." [*Lush* referred also to *In re Martin* (*b*) and *Ex parte Oliver* (*c*).] Upon the facts as stated upon the affidavits, the Commissioner had good ground for disbelieving, and consequently for being dissatisfied with the bankrupt's answers. It is possible that if the answers given in the second examination had been given in the first instance, the Commissioner would have been satisfied with them; but he is not bound to look at the last statements only, he must, on the contrary, look to all the statements made in all the examinations before he can ascertain whether the last one is satisfactory.

Willes, contrà. The question must turn on the sufficiency of the answers on the second examination. If the answers of the bankrupt on that occasion are not unsatisfactory

(*a*) 16 M. & W. 462. (*b*) 4 D. & L. 768.
(*c*) 1 Rose, 407.

within the true construction of the statute, the contempt committed at the first examination is purged. The object of the second examination is to give the bankrupt an opportunity of doing that, his omission to do which, in the first instance, was the cause of his committal. The object of the examination is not to torture the bankrupt, by compelling him to disclose the various shifts to which he may have resorted previous to his bankruptcy, in order to avoid or escape from his creditors, but simply to discover his property. By the declaration which he makes (in the form given by the act, schedule W), he promises that he "will make true answer to all such questions," &c., "respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a true and full disclosure of all that has been done with the said property, to the best of" his "knowledge, information, and belief." The examination must be conducted with this one object, and not like a hostile cross-examination. In all the cases which have been cited, the question related to the existence of property which had not been recovered for the benefit of the creditors, and the place where the property had been concealed was not disclosed by the bankrupt. The answer which really was unsatisfactory in this case, was given in reply to the question, "What were your intentions when you went to Southampton?" But that is a question which the Commissioner had no right to put, under the 11th section of the Bankrupt Law Consolidation Act. In *Ex parte Lee* (*a*) it was held by *Alderson*, B., that a bankrupt ought not to have been committed without having been first pressed by the Commissioners upon those points where his answers were unsatisfactory. The same view had been expressed by Sir *Anthony Hart*, when Chancellor in Ireland, in *Ex parte Fitz Henry* (*b*). In *Walker's case* (*c*), the warrant of commitment, after setting out a declaration which the bankrupt had made by way of accounting for certain deficiencies, stated that the Commissioners had

(*a*) 2 Mont. & A. 15. (*b*) 1 Molloy, 35.
(*c*) 1 Gl. & J. 371.

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asked him whether that was all the account he could give, to which the bankrupt had replied that it was. Lord *Eldon* discharged the bankrupt, observing that "a single question, followed by a direct answer, which question is unvaried in terms, and not followed up by any further examination respecting the transaction which may have excited the suspicions of the Commissioners, can never afford grounds for a valid commitment." In *Norris's case* (*a*), a denial by the bankrupt that he had "to his knowledge" executed a conveyance was held satisfactory, no further questions being put. In *Ex parte Baxter* (*b*),—where a person under examination with the view of ascertaining whether a bankruptcy had been concerted with him, and how the stock of the bankrupt had been disposed of, was asked with what intention the latter had, in his belief, come to him on a certain day before the docket was struck, and was committed for answering that question unsatisfactorily—Lord *Tenterden*, after observing that it was impossible to read the whole examination without seeing that the party brought before the Commissioners was most unwilling to make a full disclosure, said that it was nevertheless necessary to inquire whether the question upon which the prisoner was committed was of a nature to warrant that proceeding; and the Court thinking that it was not material, discharged him. The question referred to in the present case was not more material. [*Coleridge*, J.—You must contend that under no circumstances could the question be put. Here is a man who has told several conflicting stories, some of which he admits are false. He makes a statement with respect to what he did with his property which is utterly incredible; and I cannot say that it is immaterial for the discovery of the truth on that subject, that he should be asked with what intention he went to Southampton.] After stating that the property was in the possession of his father, any question as to his intention in going to that town was not within the 117th section.

(*a*) 2 Jac. & W. 137. (*b*) 7 B. & C. 673.

COLERIDGE, J.—I have listened to Mr. *Willes's* argument with great attention, and I quite concur with him as to the principle he contends for, both as to the manner and the matter of the examination of a bankrupt by the Commissioner. First, as to the manner: I should not say that it should be friendly nor, on the other hand, that it should be hostile. It ought to be full, fair and searching. Before the bankrupt's answers can authorize any committal at all, the Commissioner ought to be fully satisfied that the bankrupt understands him, and has the matter in question fully before his mind. He must not seek to trip him by questions which he does not understand, and then declare that he is not satisfied with the answers. On the other hand, however, it is not necessary to push this to the extent of suggesting every particular matter to the bankrupt; it would be impossible to do so, for the Commissioner must necessarily be ignorant of them. Then, as to the matter, the examination must not be a rambling one, entering into every kind of inquiry concerning the bankrupt's conduct. It must be limited to questions respecting his property. Both manner and matter, however, must obviously be modified by what has gone before, and by what is in the mind of the Commissioner and of the bankrupt.

With these general remarks, let us see what has taken place. The prisoner on his first examination, answers in such a way that it is impossible to say a word against the first committal. He is then brought up again, and having corrected his former examination in one or two particulars, he is asked whether he wishes to correct it in any other respect. He says in substance, "No, I cannot recollect. I should feel obliged if you would suggest any matter to me which may require explanation." If he had said nothing more than this, the objection to the committal would have been very strong; for the Commissioner had power to recall to his recollection matters in which his previous answers had been unsatisfactory. But he does not confine himself to this. He says, "I went to Southampton, and I put the property into the hands of a man, whom I described

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as a stranger of the name of Marshall, but who was in fact my father, Marshall Legge." He is then asked what his intention was in placing the property there. Now, his answer to that question might have been the very thing which would have enabled the Commissioner to make further inquiry. "Tell me what your intention was in going to Southampton, and then I will ask you further questions?" To which the bankrupt answers, "I went to take some rest, and to arrange with my creditors." That answer must be understood, and weighed with what went before; and in so understanding and weighing it, I cannot think that the Commissioner was wrong in holding it unsatisfactory. Without going the length of saying that the Commissioner would have been wrong in coming to a different conclusion, I think it sufficient that I do not see that he was wrong in deciding as he did: and I therefore think that this rule must be discharged.

Rule discharged.

April 23, 29.

DOLLING and Another *v.* WHITE.

Coram *Coleridge, J.*

A woman before her marriage, in 1837, lent her future husband a sum, the repayment of which he secured by a warrant of attorney to confess judgment to her and S. The defeasance provided that the husband should hold the money as long as his wife pleased, paying her interest; but that S. might, upon her request, demand payment on one week's notice. Judgment was to be entered up forthwith, and execution to issue on failure to pay after notice. Judgment was accordingly entered up, but was not afterwards revived. A demand was made in 1853, and execution issued; a few days after the sheriffs' levy the husband was declared a bankrupt.

The Court refused, on motion of the assignees, to set aside the judgment and execution, although it was insisted that the judgment was discharged or suspended by the marriage, and that, even if were not, the execution was irregular, because the judgment had not been revived.

THIS was a rule calling on the plaintiffs to shew cause why the writ of fi. fa., the levy under it, and all subsequent proceedings, should not be set aside, and why the goods seized should not be delivered to Patrick Johnson, the official assignee of the defendant.

The following were the facts of the case as they were stated in the judgment of the Court:—

Harriett White Dolling, one of the plaintiffs, a feme sole, in 1837, and about to marry the defendant, being possessed of a sum of 300*l.*, lent the same to him; and he, as a security, gave a warrant of attorney to confess a judgment for 600*l.* to her and Sandys, the other plaintiff. By the defeasance, which stated the loan to be in contemplation of marriage, the defendant was to hold the money as long as the plaintiff, or her appointee, should please, and subject to her last will, paying interest to Sandys. It was also stipulated that upon her request, whether covert or sole, Sandys might require payment on one week's notice. Judgment was to be entered up forthwith, and on default of payment after notice, execution might issue for principal, interest, and expenses.

Judgment was entered up accordingly, and the marriage subsequently took place. In May, 1845, Sandys, at the request of Mrs. White, gave notice to pay off the principal and interest, which, however, was not enforced. A second demand was made in March, 1853, and, on the 2nd of April, a writ of execution issued. The sheriff levied, and on the 5th assigned the property to two persons who acted under a power of attorney from the plaintiffs, and they entered into possession. On the 11th of April, White was duly declared a bankrupt, and this application was made without delay by his official assignee.

M. Chambers shewed cause. No sci. fa. was necessary, as execution had been suspended by the agreement of the parties, *Hiscocks* v. *Kemp* (*a*). (He referred also to *Roper on Husband and Wife*, vol. 2, p. 76.)

Aspland, in support of the rule. The rule laid down in *Hiscocks* v. *Kemp* is not disputed. It applies, however, only to cases where there is a positive agreement that execution

(*a*) 3 A. & E. 676.

shall not issue for a certain time, and not to a case like this, where execution might have issued at any time upon giving a week's notice. But further, the judgment is gone by the marriage. Whether it be wholly discharged or suspended only, is not now material. It is sufficient to say that the defendant cannot be sued on it, for he must be plaintiff. "If a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged." "So, if two men make a bond or contract to a woman, or è contra, and one of them marries with her, the bond is discharged." *Com. Dig.* "*Baron and Feme,*" D. 1. The same proposition applies equally to a judgment. *Barker* v. *St. Quintin* (*a*), shews that a judgment may be released like a bond. The case is analogous to the appointment of a debtor as the creditor's executor. The reason why that nomination operates as an extinguishment of the debt, applies equally here. It is that "a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office suspends the action for the debt: and where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged." 2 *Wms. Executors,* 1035, 3d ed. (He referred to *Richards* v. *Richards* (*b*).)

Cur. adv. vult.

COLERIDGE, on a subsequent day, delivered judgment. After adverting to the nature of the rule, and stating the facts as they are above set forth, his Lordship proceeded as follows:—

No fraud or collusion between the husband and wife is imputed, but two grounds are relied on; 1st, that the execution is irregular, because the judgment is more than a year old, and has not been revived by scire facias; 2nd,

(*a*) 12 M. & W. 441. (*b*) 2 B. & Ad. 447.

that the marriage between one of the plaintiffs and the defendant has discharged the judgment.

The general rule as to the necessity of reviving judgments more than a year old, is well known, and the principle on which it rests is stated in *Hiscocks* v. *Kemp* (*a*). Some exceptions, however, have been established consistent with that principle. The rule having been made in favour of defendants, may be waived by them; and, in the case just mentioned, it was held that a scire facias to revive the judgment was not necessary, where the execution had been stayed beyond the year by agreement between the parties, and this decision was relied on in *Morgan* v. *Burgess* (*b*), where the agreement was only by parol. This seems reasonable and just; the scire facias is given instead of an action on the judgment; if, under the circumstances, the plaintiff would not have been driven to his action, why should he be compelled to proceed by scire facias? And how could the defendant object to an execution on the presumption arising from delay, that the judgment has been satisfied, when that delay has arisen from his own agreement to it?

In the present case there is no statement of any express agreement to delay the execution, but the circumstances are peculiar, and it seems to me that an understanding between the parties to the same effect is involved in them. The loan was made and the security given in contemplation of marriage. It was, in fact, a marriage settlement of the wife's property. The paramount intention was clearly to preserve to the wife the entire property in, and controul over the money, giving to the future husband, however, not merely the income but the possession of the principal, subject to that controul, which she might exercise at any time, and insist on the payment of interest or a return of the principal. It was contemplated that this state of rights and liabilities might subsist during the whole period of coverture; in form the transaction was a loan, and the wife's security was pro-

(*a*) 3 A. & E. 676. (*b*) 1 Dowl. N. S. 850.

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vided for by the machinery of a warrant of attorney, a judgment confessed, and the short notice of a week; but in substance it was a marriage settlement. And it is manifestly inconsistent with the intention of either party that at the end of a year from the signing of the judgment, which was to be signed forthwith, a revival by scire facias should be necessary before execution. No execution was contemplated before the end of the year, probably never; but in case it should be necessary to enforce the judgment, the week's notice at any time during the whole indefinite period of coverture was the only condition which it was intended to make necessary. Could then the defendant have been heard to allege anything against the execution on the score of delay, when such delay was manifestly in pursuance of the original intention of both parties, and for his benefit? I think this is at least so doubtful, and so contrary to equity, that I do not feel called on to set aside the execution, on this ground, at the prayer of his assignee, who ought not, in this respect, to stand in a better condition than himself.

The second ground relied on was the marriage, which it was said had discharged the judgment. Undoubtedly the general rule is, that if a man marries a woman to whom he is indebted, the debt is extinguished by reason of the unity of persons created by the marriage. With the debt, the security, whether bond or judgment, is extinguished also: the debt having been present with an immediate right of action, that right is not merely suspended but extinguished. This rule is, however, subject to many exceptions: and where, in the creation of the debt, marriage was contemplated, and a trustee for the future wife has been interposed, in whom is a legal right to sue, it has been held that the right of action is not even suspended by the marriage alone. If, therefore, the judgment had been confessed to Sandys alone, as trustee for Mrs. White, the objection clearly would have failed. The question then is, whether, upon a close examination of the instrument, the

transaction is not the same in substance. By the defeasance it appears that the loan, which was the consideration, was in contemplation of marriage, then intended, and that Sandys was introduced as trustee on that account. He is applied to to act for her, he agrees to do so at her request, and by her direction *he* lends her money, the interest is to be paid *to him* for her; *he*, upon her request, is to demand and sue for the principal, and upon non-payment *he* is to sue out execution. The defendant, who was a party to all this arrangement, could not, I think, have contended immediately after the marriage that the whole was a nullity—that if the wife desired repayment of the principal, there was no right of action in Sandys to enforce it, or that he could not exercise it, because the wife was a party to the judgment confessed while she was sole. If the proceeding were in form erroneous, he has released the error; and it would be strange that he should be at liberty to call upon the Court to proceed summarily to set aside what he was not at liberty to avoid by writ of error. Upon a motion of this sort, I think the substance of the transaction is to be looked to. This objection is founded only on the form, and ought not to prevail. The rule, therefore, will be discharged; and being an experiment to defeat in effect an honest marriage settlement, must be discharged with costs.

Rule discharged.

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COPELAND *v.* CHILD.

Coram *Coleridge, J.*

The Court will not grant a rule under the 6th section of the 1 & 2 Vict. c. 110, to discharge a defendant arrested under the 3rd section, upon the ground that the plaintiff has no cause of action against the defendant (*a*).

MILLER, Serjt., moved for a rule calling on the plaintiff to shew cause why an order of *Platt*, B., for issuing a capias against the defendant should not be rescinded.

The affidavit upon which the order had been made, stated that the action was brought for breach of promise of marriage, and that the plaintiff had sustained damage to the amount of 20*l.* at least. Two promises were sworn to, one verbal, the other in writing.

The affidavit of the defendant in support of the present motion averred that he was an infant when the promises were made.

(*a*) Comp. *Pegler* v. *Hislop*, 1 Exch. 437; S. C. 5 D. & L. 223, and the judgment of the Court of Exchequer, in *Gruham* v. *Sandrinelli*, 16 M. & W. 191, 197. See also *Bullock* v. *Jenkins*, 1 L. M. & P. 645.

Miller, Serjt. If it be shewn to the satisfaction of the Court that the plaintiff has no cause of action, the order for the capias should be rescinded. The 6th section of the 1 & 2 Vict. c. 110 (*a*), enacts that the party arrested may apply to a Judge or Court for a rule or order on the plaintiff to shew cause why he should not be discharged out of custody, and that the Judge or Court may make it absolute

(*a*) "That it shall be lawful for any person arrested upon any such writ of capias to apply at any time after such arrest to a Judge of one of the superior Courts at Westminster, or to the Court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to shew cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such Judge or Court to make absolute, or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem fit; provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order."

or discharge it: and its language is general enough to embrace an application for discharge from custody grounded upon the non-existence of a cause of action. [*Coleridge*, J. —Am I now to try the question of infancy? Suppose a plaintiff swears that the defendant owes him 35*l.*, is the Court to hear affidavits on the other side to shew that the debt is less than 20*l.*] The 3d section authorizes the issuing of a capias only upon the plaintiff, shewing "to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* and upwards, or has sustained damage to that amount;" and if facts are brought before the Court to raise a serious doubt as to the plaintiff having any cause of action, it will not make an order for the capias under this section, or will, under the 6th, rescind it if made. [*Coleridge*, J.—Is there any case in which a Judge has gone into that question? When a plaintiff, before the act, made an affidavit of debt, was such a thing as an affidavit in answer ever heard of? When the Duke de Cadaval was arrested for debt, he had no other remedy than an action. (*a*).] That was an evil which it was intended that this act should redress. [*Coleridge*, J.—The object of the act was to take away the capias in all cases except where the defendant was about to go abroad.] Its object was more extensive than that. It is no longer sufficient to swear to the existence of a good cause of action; it is necessary to prove it to the satisfaction of the Judge; and for that purpose the particulars of the transaction out of which the action arises must be stated upon the affidavit. The 3rd section of the act requires that the plaintiff shall make out a good primâ facie case to the satisfaction of the Judge, and shall not be entitled to a capias upon a mere affidavit of debt. If such a primâ facie case be made out, and the capias issue, the 6th section enables the defendant to apply for a rule to shew cause why he should not be discharged; and surely he cannot better establish his claim to be discharged than by

(*a*) *De Cadaval* v. *Collins*, 4 A. & E. 858.

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shewing that the capias has been issued upon an imperfect statement of the facts, and that no cause of action really exists against him. The language of the section is quite general enough to give him a right to a rule on the ground that there is no cause of action, as well as on the ground that he is not about to leave England. The rule asked for is only a rule nisi; and the plaintiff may meet it with fresh affidavits. If this be done successfully, the rule will, of course, be discharged; but if the plaintiff be unable to contradict the defendant's case, and the Court see clearly that no cause of action exists against him, it would be a grievous injustice not to restore him to his liberty.

COLERIDGE J.—I am clearly against this application on principle. The act of Parliament in question is not old, but I believe the practice under it has been uniform, and quite contrary to that which is now contended for. Before the act, an affidavit of debt was sufficient for issuing a capias, and the only checks on plaintiffs were the powers of bringing the bail bond before the Courts for defects apparent on the face of it, and the liability to costs under the 43 Geo. 3, c. 46, if the amount of bail had been excessive. The present act was passed, as the preamble states, because the "power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed," or rather restrained; and the 1st sect. enacts that no person shall be arrested on mesne process, expressly provided by the statute. The 2nd sect. enacts that actions shall thenceforth be commenced by writ of summons. The object of this was to get rid of the capias. Then the 3rd provides that in all cases the plaintiff shall do two things: he must shew to the satisfaction of the Court, first that he has a good cause of action for 20*l.* at least, or has sustained damage to that amount, and secondly that the defendant is about to leave England. These are two distinct and different matters; one going to the cause of action, or the merits of the plaintiff, the other wholly collateral to it; viz., the departure of the defendant from the

country. The 6th section then enacts [His Lordship read the section (*a*)]. I quite agree that there is nothing restrictive in these words; but the Judges, in acting under it, have always taken into consideration what was the state of the law before the act passed, when the defendant was not allowed to deny the truth of the affidavit to hold to bail, but was confined to objections appearing on the face of it. There is, indeed, nothing in the act to indicate that any distinction is to be made between the two questions, but the Judges have held that, as before the statute they never inquired into the cause of action, because that was a matter which was to be decided by the jury at the trial, so now the affidavit, so far as it relates to the cause of action, stands upon the same footing as under the old law, and can be impeached only in respect of matters which appear on the face of it. The only question inquired into by the Court is a matter which the jury do not inquire into. On that point which cannot be discussed elsewhere, and which must receive its final determination here, if it is to be decided at all—for the jury at the trial have nothing to do with the residence of the defendant, and that question is then wholly immaterial—the defendant is at liberty to file affidavits contradicting those on which the Judge acted. The plaintiff, in his turn, is admitted to file fresh affidavits, and the question is finally decided by the Judge. If a different practice were adopted, this inconvenience would follow, that the Judge, listening to the person who swore most stoutly, might discharge the defendant, and yet the jury, upon the trial, might find the other way. The plaintiff would thus succeed in the action, but in the meantime the defendant would have left the country.

I am clearly against the application. The practice under the act has been uniform. It is founded upon what was the law before, and upon what must be most convenient and equitable now.

Rule refused.

(*a*) Ante, 176 n.

May 7.

Ex parte HENRY BENJAMIN EARLE.

Coram *Coleridge*, J.

An articled clerk, who had taken an A.B. degree, and had been articled for three years to an attorney under the 7th sect. of the 6 & 7 Vict. c. 73, served two years with the attorney, and eight months with his London agent, after which he went to a special pleader for four months, and was then examined, and passed. The examiners having refused to issue their certificate, on the ground that the clerk had not served the attorney or agent for three years, as required by the act, the Court gave him liberty to enter into further articles for four months, to complete the three years' service, and authorized the examiners, at the expiration of the time, to issue their certificate without further examination.

CROWDER applied that Mr. Earle, an articled clerk, should be at liberty to enter into further articles for four months, and that he should, after service for that period, be admitted without further examination.

Mr. Earle, it appeared, had taken his A.B. degree at Oxford, on the 14th January 1850, within six years after matriculation, and on the 19th was articled to his father, an attorney at Andover, for three years. After serving for two years, he came up to London, and served a further period of eight months with the town agents of his father. He then went to a special pleader for four months, after which he went up for his examination, and passed it. Upon applying for the examiner's certificate, however, he was informed that it could not be granted, as he had not served the full period required by the 6 & 7 Vict. c. 73, s. 7. The sixth section of that act requires a five years' servitude, one of which, however, may be passed with a practising barrister, special pleader, or the London agent of the attorney to whom the clerk is bound; but the seventh section contains no such exceptional provision. It enacts that any person having taken the degree of B.A. within six, or of LL.B. within eight years after matriculation, at Oxford, Cambridge, Dublin, Durham, or London, and who shall, within four years from taking such degree, be articled to a practising attorney or solicitor "for and during the term of three years," and "shall have continued in such service for and during the said term of three years, and shall during the whole of such term have been actually em-

ployed by such attorney or solicitor, or by the London agent of such attorney or solicitor, with his consent, for any part of the said term, not exceeding one year, in the proper business," &c. may, after being examined and sworn, be admitted, &c. [*Crowder* referred to *Ex parte Hubbard* (*a*) and *Ex parte Frost.* (*b*)]

COLERIDGE, J.—I see no objection in principle to granting this application. The examiners should be at liberty, if they are satisfied with the examination, to sign the certificate, which, however, will be stayed until the service for the further time shall be completed. (*c*)

(*a*) 1 Dowl. 438.

(*b*) 3 Dowl. 322.

(*c*) The rule was drawn up as follows: "That the said H. B. Earle shall be at liberty to enter into further articles for a further term of four months, or such other time as shall be necessary to complete the three years' service pursuant to the statute, and that upon the completion of such service the present examiners be at liberty to issue their certificate of the fitness of the said H. B. E. to be admitted, upon his examination already had, without his being examined again, the said H. B. E. giving the usual notices of admission."

BRANDON *v.* SMITH. *May 9.*

Coram *Coleridge, J.*

LUSH moved to draw up a rule of Court, pursuant to the certificate of a barrister.

Before shewing cause against a rule, the counsel on both sides signed indorsements on their briefs referring it to a barrister to decide what should be done respecting that matter of the rule, and also respecting other matters in dispute between the parties, and providing that he should direct what rule should be drawn up. The referee directed, by his certificate, that the rule should be made absolute, and that a sum should be paid by one party to the other, and that to enforce that payment a rule should be drawn up.

The Court allowed two rules to be accordingly drawn up—one on the terms of the indorsement on the briefs, the other according to the terms of the certificate.

It appeared that, in Hilary Term last, a rule had been obtained, calling upon the plaintiff, an attorney, to pay

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to an arbitrator to whom this cause had been referred, the sum of 15*l.*, in pursuance of his undertaking. Before shewing cause against the rule, it was agreed that the dispute should be referred to a gentleman of the bar, and the counsel signed the following indorsement on their briefs: "Refer to Mr. M. C. to say what is right to be done, both with reference to the matter mentioned in the rule, and to the residue of the arbitrator's charges, andto direct what rule shall be drawn up."

The referee certified that the rule should be made absolute, that the plaintiff should also pay to the arbitrator the further sum of 31*l.* 11*s.* 6*d.*, and that, if necessary, a rule of Court should be drawn up to enforce the payment of the last mentioned sum.

COLERIDGE J.—I see no reason why this should not be done. There should be two rules—one in the terms of the original consent, authorizing the referee, among other things, to direct what rule should be drawn up, and the other in accordance with the terms of his certificate.

Rules accordingly.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Trinity Term.

IN THE SIXTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who usually sat in the Bail Court in this Term, was COLERIDGE, J.

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The QUEEN *v.* The SADDLERS' COMPANY.

May 7.
June 8.

Coram *Coleridge, J.*

A mandamus, after stating the incorporation of a company by letters patent, which provided for the election of officers, and their removal for misconduct, or other sufficient reason, alleged that A. B., being a freeman, and duly qualified, was duly elected, and that although he had not misconducted himself, he had been wrongfully, and contrary to the letters patent, removed.

THIS was a rule calling upon the defendants to shew cause why they should not amend their return to a mandamus, or strike out of it certain passages hereafter specified, on the ground that it was so framed as to prejudice, embarrass, or delay the fair trial of the cause.

The mandamus recited that by the letters patent of Charles 2, which incorporated the Saddlers' Company, it was provided that four wardens should be elected annually from the freemen of the company, and twenty assistants for life; and that if any of such assistants should die, resign, or be removed, a new assistant should be elected in his place. "Ill government or ill conducting himself, or any other just or reasonable cause," were declared sufficient grounds of removal; and power was given to the wardens and eight assistants to make bye-laws for the good rule and

The return alleged, 1. That the letters patent were not fully set out in the writ, and that they provided that every election, contrary to their provisions, should be void. 2. That A. B. was not duly qualified. 3. That he was not duly elected. 4. That he had been guilty of misconduct; and 5. That he had not been wrongfully, and contrary to the letters patent, removed. It then detailed the facts on which the defendants relied—stating that by a bye-law no bankrupt was eligible, that A. B., knowing this rule, fraudulently represented himself to the company as solvent, and induced them to elect him; that he soon afterwards became bankrupt, and thereupon was "duly and according to law" removed.

Held, that the return was not so framed as to prejudice the prosecutor in pleading within the 52nd section of the Common Law Procedure Act.

Whether that act applies to mandamus, *qu.* ?

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governance of the company. The writ then averred that on the 20th of October 1849, Kay Dimsdale, being a freeman and liveryman of the company, and duly qualified in that behalf, was, at a meeting of the wardens and assistants, duly convened, &c., duly elected one of the assistants: that although he had not ill-conducted himself, and had not been guilty of any ill government, and although he was duly in and entitled to hold his office, and no just or reasonable cause existed for his removal from it, yet the wardens and other assistants wrongfully, unlawfully, and against the will of him, the said Kay Dimsdale, contrary to the tenor of the said letters patent, and without any just or reasonable cause, removed him from his said office, and wrongfully, &c., kept him so removed.

The return alleged that the letters patent were not fully or truly set forth in the mandamus, and averred that they provided that every election contrary to their provisions should be void. It then alleged that Dimsdale was not duly qualified to be elected assistant as in the writ mentioned, modo et formâ; that he was not duly elected; that he had ill conducted himself, and was not duly in or entitled to hold his office of assistant: that there was just and reasonable cause for his removal: that the company did not wrongfully or unlawfully, or contrary to the terms of the letters patent, or without just or reasonable cause remove him from his office, modo et formâ, or wrongfully &c. kept him removed. The return then, after stating that the company was possessed of considerable funds for charitable and other purposes, of which the assistants had the uncontrolled management, and of which one of the wardens, elected from among the assistants, was the treasurer—alleged that the wardens and assistants had, in 1799, made a bye-law to the effect that no person who had been a bankrupt or insolvent should in future be admitted a member of the court of assistants, unless it were proved that after his bankruptcy or insolvency he had paid his creditors the whole of their debts, or borne a fair and honorable character for seven years subsequent to his bankruptcy or insolvency, to the satisfaction

of the majority of the court; that Dimsdale knew of this rule, but nevertheless, with the view of inducing the wardens and assistants to elect him, falsely and fraudulently represented himself to them as solvent, whereas he then was and had ever since been insolvent; that by means of such misrepresentation he induced them to elect him; that he soon afterwards became bankrupt; and that upon information of that fact, the wardens and assistants, at a meeting duly convened, "duly and according to law" in that behalf, for the cause aforesaid resolved and determined that he should be removed, and that he was removed accordingly, and for the causes aforesaid ought not to be restored.

The passages in this return which were objected to, and which the defendants were required by the rule to amend or strike out, were those which averred that the letters patent were fully or truly set forth in the mandamus; that Dimsdale was not duly qualified to be elected assistant, modo et formâ; that he had ill conducted himself, and was not duly in, &c.; that there was reasonable cause for his removal; that the company did not wrongfully &c. remove him from his office modo et formâ; and that the wardens and assistants "duly and according to law" &c., resolved to remove, and did remove him.

Willes shewed cause. This application is founded on the 52nd section of the Common Law Procedure Act; but that section does not apply to proceedings by mandamus. It gives the power of applying to the Court to strike out or amend "any pleading" which is so framed as to prejudice, embarrass, or delay, the fair trial of "the action;" but the interpretation clause (sect. 227) defines that word as meaning "any personal action brought by writ of summons in any of the said Courts."

Assuming, however, that the 52nd section applies to the present case, the objections to the return cannot be sustained. The averments objected to are principally traverses of allegations in the writ. Thus the statement that Dimsdale was not duly qualified to be elected, is a traverse

of the averment in the writ that he was qualified, and could not have been omitted in the return without rendering the latter bad. So the allegation that he had ill conducted himself is a denial of the statement in the mandamus that he had not ill-conducted himself, &c. With respect to the averment that the letters-patent have not been fully or truly set forth, it surely must be open to the company to allege that the instrument upon which the claim is founded, has not been fully set out. As to Dimsdale's removal, "duly and according to law," those words express with sufficient particularity that every requisite formality was followed.

Lush, in support of the rule. Although many portions of the act relate solely to actions, in the strict acceptation of that term, many others are not so limited. The preamble discloses no intention to confine the enactments to actions; for it recites that "the process, practice, and mode of pleading in the superior Courts," "may be rendered more simple and speedy." The series of sections which immediately follow apply, it is admitted, exclusively to actions; but the 49th, and following sections, apply to "pleadings in general," words wide enough to extend to proceedings in mandamus. If they be construed in a more restricted sense, all the pleadings in mandamus will be still open to special demurrer, and to all the technical objections which it was the object of the act to abolish.

The objections to the return are well founded. The return must, like a plea or replication, traverse matters of fact only and not matters of law. If the writ had averred merely that Dimsdale was duly qualified and was elected, the traverse in the return might have been good. But the writ states the facts, which shew that he was qualified—that he was a freeman and liveryman, &c., and the return should have traversed them, and not the inference of law derived from them—viz., that he was duly qualified. If this were allowed, it would be impossible to ascertain what defence would be set up at the trial. [*Willes.* The

writ does not say that Dimsdale was a freeman and liveryman, &c., and *thereby* duly qualified, but that he was a freeman, &c., *and* duly qualified.] The return is, nevertheless, equally embarrassing. Next, the return alleges that he ill conducted himself, but does not, as it should, set out the particular acts of misconduct. It does not even assert that he ill conducted himself in his office; and bankruptcy is not such ill conduct as to justify his removal; *Rex* v. *Town of Liverpool* (*a*). The averment that the company did not wrongfully or unlawfully, or contrary to the terms of the letters patent, or without just or reasonable cause, remove Dimsdale from his office, in manner in the writ alleged, would be obviously bad on special demurrer. It is a negative pregnant; it does not admit that there was any removal whatever. With respect to the allegation that the letters patent have not been fully set forth, enough has been set forth to shew the title of the prosecutor; and if the other side rely on any other part, they should set it out in their return. As to the company having removed him, "duly and according to law," it does not appear that he was ever summoned, which is an essential preliminary to removing a man from a corporate office; and those words cannot be understood to involve the averment that he was. At all events this is not free from doubt, and the averment consequently embarrasses the prosecutor.

Cur. adv. vult.

COLERIDGE, J.—In this case, an application was made under the 52nd section of the Common Law Procedure Act, to strike out or amend certain portions of the return to a writ of mandamus, as having been framed so as to prejudice, embarrass, or delay the fair trial of the ultimate issues between the parties; and a preliminary question was much discussed, whether the section of the Act applied at all to proceedings on mandamus. It may become very important to settle that question; but it is one which, upon consider-

(*a*) 2 Burr. 723.

ation, I have found great difficulty, and I do not think that it ought to receive, unnecessarily, its determination in this Court.

Now, looking at the pleadings, it does not seem to me that they would call for the interference of the Court, assuming the statute to apply. The case supposed by the 52d section is, "a pleading so framed as to prejudice, embarrass, or delay the fair trial of the action," and these words distinguish it from cases in which a pleading may be demurrable specially, and yet its meaning be so plain in substance, and its object so fair, that the trial may be held on it without prejudice, embarrassment, or delay. Even if the pleading be technically correct in form, and also not open to a general demurrer, yet, if it be unfair pleading, and of a sort to prevent or impede an equal trial of the merits, the statute has given to the Court or a Judge a discretionary power to amend or strike it out. In effect the statute says that no pleading shall be demurred to specially, and that even if it be not open to general demurrer, yet if it be so framed as to prejudice, embarrass, or impede the trial, it shall be open to amendment or excision by the Judge or Court.

The present return, assuming it for the purpose of the argument to be within this part of the statute, must be tried on this principle. Now, it consists of two divisions; first, it traverses in terms the general allegations of the writ, then it expands those traverses, by shewing in detail the facts on which they are to rest; altogether, it discloses the whole case of the defendants.

It is the first division to which exception is made. Thus, for example, the writ having alleged that the prosecutor being duly qualified was elected an assistant, the return says he was not duly qualified to be elected such assistant. It may be that, if the return had stopped there, although there would have been no difficulty as to form, the prosecutor might have successfully alleged that a fair trial was prevented or embarrassed, because the particular in which it would be contended he was not duly qualified had not

been pointed out on the record, nor could he tell whether the jury would have to consider a mere want of qualification in fact, or a disqualifiction resulting in law from the facts. But as the return goes on to specify all the circumstances, it seems to me the difficulty is removed exactly as much as if the specification had immediately been tacked on to the general traverse. The same remarks apply to the allegations of ill conduct, just cause for removal, and denials of wrongful removal, or wrongfully keeping the prosecutor removed. It must be remembered that we are not discussing a question of pleading, whether demurrable or not, generally or specially. If the objection be, that it is open to a general demurrer, the case is not within the statute; then the opponent should demur, else he deprives the other side of his writ of error. If it be only that it is demurrable specially, the statute has taken away the objection. The only consideration is the fair and speedy trial. Considered in this point of view, and taking the whole section together, it does not seem to me that, so far as I have gone, the objections are sustainable.

There remains, however, one particular to be noticed. The mandamus, in the usual way, at great length, sets out the charter incorporating the Saddlers' Company. The return commences with an allegation that it is not truly or fully set forth, but that divers material portions thereof are omitted, and then immediately specifies that in it it is provided that every election of an assistant contrary to its directions and restrictions, should be void and of no effect. It seems to me that this grows out of the 55th and 56th sections of the act, the former doing away with profert, the latter enabling a party to set out any part of a document pleaded by his opponent which he may think material, if it has been omitted. And I do not see that the prosecutor is at all embarrassed by this allegation or insertion. He is not called upon to traverse or make any answer to it. This rule, therefore, will be discharged.

Rule discharged.

June 11.

In re MORRIS.

Coram *Coleridge, J.*

Where the Court is satisfied that a rule nisi for an attachment has reached the hands of the person against whom it is directed, and that he is keeping out of the way to avoid service, it will make the rule absolute, notwithstanding its not having been served personally.

LUSH moved to make absolute a rule for an attachment without an affidavit of personal service of the rule nisi, under the following circumstances.

On the 31st of January last a rule was obtained requiring Morris, within a week, to pay a sum of money or to deliver certain shares in a joint stock company to one Todd. This rule was not served until after repeated efforts for that purpose; and as it was not obeyed, a rule nisi for an attachment was obtained in Easter Term. A copy of the rule was left with a clerk at his office, but was not served personally upon him. Shortly afterwards, Morris was met in the street, and informed that the rule had been obtained, when he said he should keep out of the way to avoid service. The clerk, with whom the copy of the rule had been left, stated that Morris had been at his office at a later hour on the day when the rule had been left there; but he said that he had not given it to him. Other attempts were afterwards made to effect personal service, but these failed. He could not be found, nor his address be obtained; and it was now sworn that it was believed that he kept out of the way to avoid service. In support of the present application *In re Pyne* (*a*) was cited.

COLERIDGE, J.—I think that this rule ought to be made absolute. Perhaps it is to be regretted that the authorities have not gone to this extent,—especially in the case of an attorney,—that a rule should be deemed sufficiently served, if it were distinctly made out that the party had knowledge of its existence, and kept out of the way for the purpose of

(*a*) 1 D. & L. 703.

avoiding personal service. It is not, however, necessary to go so far in the present case. The facts shew clearly enough that this person was served,—unless, indeed, the Court be prepared to declare that although it is satisfied, upon the evidence, that the rule reached the hands of the attorney, nothing short of an affidavit of personal service will suffice. I am satisfied in my own mind that if this case went before a jury upon an issue, whether the rule had reached his hands or not, they would be justified upon this evidence in finding that it had. For the purpose of the question here to-day, the Court stands in the position of a jury. I am clearly of opinion that the rule did reach this attorney; and that being so, I break in upon no principle in saying that the rule ought to be made absolute.

Rule absolute.

Ex parte JABEZ DAVIS. *June* 13.

Coram *Wightman, J.*

A summons to answer the charge of being the father of a bastard child was left at the abode of the putative father eight days after he had quitted it for Liverpool, on his way to America. He remained at Liverpool four days before sailing. He did not leave the country to avoid service. A bastardy order having been made against him in his absence, reciting that the summons had been duly served upon him:

Held, upon motion for a certiorari to bring it up to be quashed,

1. That the summons had been left at the "last place of abode."

2. That as the order was regular, and the truth of the charge was not denied, this Court would not interfere.

WILLES moved for a certiorari to remove an order of affiliation, for the purpose of being quashed.

It appeared upon the affidavits that Jabez Davis, on whose behalf the motion was made, lived with his father and mother, until the 7th day of November, 1850; and that on that day, without having any suspicion that any such application as hereafter mentioned was in contemplation, and without any intention of avoiding service, he left his home for Liverpool to go to America, in pursuance

of arrangements entered into long before. After remaining at an inn in Liverpool for a few days, he sailed for his destination on the 11th of the same month, and worked there as a miner until the end of 1852, when he left the country, and returned to England on the 4th of January, 1853. On arriving at his father's house he learnt, as the fact was, that a summons had been issued against him on the 15th of November, 1850, requiring him to appear before two justices to answer the charge of being the father of a bastard child, and had been left at his father's by the parish constable who was, at the time, informed of the circumstances attending his departure; that the justices had, on the 3rd December following, made an order against him, which, after reciting that he had been duly served with the summons, "as is now proved before us," adjudged him to be the father of the child, and ordered him to pay a weekly sum for its maintenance. Two days after his return he was arrested for disobedience of the order.

Willes. Upon general principles the applicant is clearly entitled to the relief now asked; and the only question is whether the language of the 7 & 8 Vict. c. 101, is so peremptory as to deprive him of that right. The 3rd section of that act authorizes the justices to act either upon the appearance of the person summoned, or "on proof that the summons was duly served" upon him, "or left at his last place of abode, six days at least before the petty session." Here the summons was certainly not served personally, nor, it is contended, was it left at the last place of abode. The act, indeed, can hardly be held to apply at all to a person out of the jurisdiction; but here, at all events, the place where the summons was left was not his last place of abode. In *Ex parte Jones* (*a*) it was held, that the "last" place of abode means his present abode, if he has any, and the last which he had, if he has ceased to have any; and the last place where the applicant dwelt before the issuing of the summons was at Liverpool, where

(*a*) 1 L. M. & P. 357.

he remained for some days before sailing. [*Wightman*, J.—His going to an inn for a few days, while waiting to embark, would hardly make it his place of abode. 'I think we must take it that his father's house was his last place of abode.] The general principle of our law is, that all proceedings against a person must be founded upon his being warned of them. It is said that justices of the peace once had the power of adjudicating summarily without summons; 4 *Bl. Comm.* 282; but the law has been long since settled otherwise. In *Ferguson* v. *Mahon* (*a*) it was held a good plea to a declaration upon a judgment recovered in Ireland, that the defendant had not been served with process in the original action. Here it is clear that the applicant was not made acquainted with the intended proceedings, and that the constable must have misled the magistrates, or that they must have committed an error of judgment when they found that Davis had been duly summoned. Indeed, that recital seems to indicate that they thought he had been served personally; for if they had proceeded on the supposition that the summons had been left at his last place of abode, the order would have so recited the fact; for it is to be observed, that the act does not provide that the party may be served by leaving the summons at his last place of abode, but that the justices may proceed if it has been so left. [*Wightman*, J.—Does Davis swear that he is not the father of the child?] No.

Wightman, J.—The proceedings of the justices are perfectly regular, and in conformity with the provisions of the act of Parliament; and it does not appear that any injustice has been done. If there had been any injustice there might be ground for interfering; but where the applicant does not deny the truth of the charge, and the proceedings are in due form according to the statute, there is no ground for interfering. The ground of the application must be that an unjust charge was got up in his absence, and that

(*a*) 11 A. & E. 179.

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he has not had an opportunity of meeting it. The justice of the charge is not denied; and the proceedings are, unquestionably, regular on the face of them; therefore, I think, no rule should be granted.

Rule refused.

June 13.

NICHOLS *v.* TUCK.

Coram *Wightman, J.*

To a declaration in debt for 100*l.* the only plea was a set-off of 120*l.* The particulars delivered with the declaration claimed 4*l.* 10*s.* At the trial a set off was proved to an amount exceeding the sum claimed in the particulars, but less than that claimed in the declaration. *Held*, that the defendant was entitled to the verdict.

DEBT in 40*l.* for work, labour, and attendance as an attorney and solicitor, and in 20*l.* for money paid, and 40*l.* upon an account stated. The particulars of demand claimed a balance of 4*l.* 10*s.*

Plea. Set-off of 40*l.* for goods sold and delivered, 40*l.* money paid, and 40*l.* on an account stated.

Upon the trial before the under-sheriff of Middlesex, on the 11th of May last, the defendant proved a set-off exceeding the amount claimed by the particulars, but less than the amount claimed by the declaration. As there was no plea of never indebted, the under-sheriff directed the jury to find a verdict for the plaintiff for nominal damages, which they did accordingly.

A rule having been subsequently obtained for a new trial on the ground of misdirection,

Hawkins shewed cause. It is admitted that if the defendant had pleaded never indebted, he would have been entitled to the verdict; but as he did not do so, the plaintiff is entitled to a verdict for nominal damages. If the defendant had allowed judgment to go by default, judgment would have been signed for the full amount stated in the declaration, although execution would have been issued only for

the amount claimed in the particulars. The plea of set-off admits that the amount alleged in the declaration, which is 100*l.*, is due; and *Rodgers* v. *Maw* (*a*) shews that when the amount proved under the set-off does not cover the demand in the declaration, the defendant is not entitled to a verdict on the plea of set-off, but the amount proved goes only in reduction of damages. [*Wightman*, J.—It would follow, then, that the plaintiff would be entitled to recover the difference between the 100*l.* claimed by the declaration and the amount of the set-off proved by the defendant.] The plaintiff is entitled to the verdict, but he can have only nominal damages. In *Roche* v. *Champain* (*b*), the declaration claimed 19*l.* 10*s.*, and the only plea was a set-off of 50*l.* The particulars of demand claimed 6*l.* 10*s.*, and a set-off of precisely that amount was proved. It was held that the defendant was not entitled to the verdict. That case is precisely in point, and must govern the decision in the present instance. *Ford* v. *Beech* (*c*), which may be relied upon on the other side, is altogether different; for there the defendant had pleaded non assumpsit as well as a set-off. [He referred also to *Tuck* v. *Tuck* (*d*).]

T. Jones in support of the rule. The case of signing judgment by default has no application here. Judgment is then, as was stated on the other side, signed for the amount claimed in the declaration. But when, as in the present case, the cause goes down to trial, judgment is signed for the amount found by the jury. Here the jury found that nothing was due to the plaintiff, for the defendant proved a set-off equal to his demand. It is said, however, that this is not so, because the demand was 100*l.*, the amount stated in the declaration, and not 4*l.* 10*s.*, the sum claimed by the particulars. This argument, however, goes the extent of asserting that the plaintiff is not bound by his particulars,

(*a*) 4 D. & L. 66; S. C. 15 M. & W. 444.
(*b*) 5 D. & L. 151; S. C. 1 Exch. 10
(*c*) 11 Q. B. 842.
(*d*) 5 M. & W. 109.

and that a defendant, although ready to admit the amount mentioned in them must, nevertheless, plead the general issue and deny that anything is owing by him. The inconvenience of such a doctrine is obvious. The plaintiff would in every instance be compelled to prove a case which his opponent admitted. If the plaintiff is entitled to anything, it is to the difference between the amount which he claims and the set-off which the defendant proves. If the latter is equal or in excess of his demand, the plaintiff is entitled to nothing, and cannot have a verdict. For this purpose the declaration cannot be looked at alone. It must be read in connection with the particulars; and although these are not before the Court, yet, as was observed by *Erle* J. in *Turner* v. *Collins* (*a*), the Court will take notice that particulars may have been delivered, and that in this case they claimed 4*l.* 10*s.* only. It is well established that the sum stated in the declaration goes for nothing; *Cousins* v. *Paddon* (*b*), *Mee* v. *Tomlinson* (*c*), *Moore* v. *Butlin* (*d*). The plea of set-off alleges in effect, that the debt due to the defendant is as great as, or greater than that recoverable from him by the plaintiff, and therefore impliedly denies that anything is due by the defendant. *Roche* v. *Champain* (*e*) cannot be relied upon. It was evidently decided in haste, for no reasons are given for the judgment.

WIGHTMAN, J.—In *Arden* v. *Connell* (*f*), *Holroyd* J. said that "it is not true, as an universal proposition, that in debt, where the defendant suffers judgment by default, the plaintiff is entitled to final judgment without executing a writ of inquiry." In that case, the action was in debt for use and occupation, and *Holroyd*, J., held that a writ of inquiry might well be executed after judgment by default. Undoubtedly, however, the course of practice in actions of debt has been

(*a*) 2 L. M. & P. 99, 103.
(*b*) 2 C. M. & R. 547.
(*c*) 4 A. & E. 262.
(*d*) 7 A. & E. 595.
(*e*) 5 D. & L. 151; S. C. 1 Exch. 10.
(*f*) 5 B. & A. 885.

that the plaintiff signs final judgment, and issues execution at his peril. In the present case it appears that the plaintiff declared in debt, and that the sums claimed in the several counts, amounted together to 100*l.* The counts are the common ones, and the sums laid in them are not material. The plaintiff might have proved any amount not exceeding that claimed by the declaration. The plea of set-off, on the other hand, is equally general. It adopts the same form as the declaration, and the defendant is no more bound to prove the exact sum alleged, than the plaintiff is to prove that mentioned in his declaration. The effective part of the plea is that part which asserts that the sums of money due by the plaintiff exceed the debt due to him. It is contended on behalf of the plaintiff, that the defendant is bound by the precise sum stated in the declaration, although the plaintiff is not: but that is not so. Now, suppose the plaintiff had proved that 4*l.* 10*s.* were due to him, and the defendant had proved that the same sum was due to himself; as the sums in the declaration and plea are immaterial, and as the question is whether the sum really due to the plaintiff exceeds that which he owes, the defendant ought to succeed. In neither case are the true sums stated on the record, nor does the evidence appear upon it; but the issue between the parties is whether the defendant's demand is equal to or exceeds that of the plaintiff, and if it does, the verdict must be found for the defendant. It is unnecessary in such a case to resort to the supposition to which my brother *Erle* had recourse in *Turner* v. *Collins* (*a*), for the purpose of meeting the justice of the case.

Rule absolute.

(*a*) 2 L. M. & P. 99, 103.

June 11 & 15

REGINA *v.* The Justices of DERBYSHIRE.

Coram *Coleridge, J.*

When, upon obtaining an order under the 8 & 9 Vict. c. 126, for the maintenance of a pauper lunatic, no notice of chargeability is served, the twenty-one days within which notice of appeal must be given are to be computed from the service of the order.

THIS was a rule, calling upon the justices of Derbyshire to enter continuances and hear an appeal against an order for the maintenance of Mary Milsom, a pauper lunatic.

The order in question which bore date the 25th November, 1852, adjudicated the settlement of Mary Milsom, a lunatic, to be in the township of Mangotsfield, and required the overseers of that township to pay to one of the overseers of Glossop and the treasurer of the Glossop Union, certain charges and expences for the conveyance to the asylum and maintenance, medicine, clothing, and care of the said pauper lunatic. The order was served on the overseers on the 15th of February, 1853; and they, on the 19th of March, served a notice of appeal for the Easter sessions. No notice of chargeability, or statement of the grounds of removal, or particulars of settlement, was sent to the parish officers of Mangotsfield. When the appeal came on to be heard at the sessions, the respondents objected that the notice had not been given in time, not having been served within twenty-one days after service of the order. The justices held the objection fatal, and dismissed the appeal.

Pickering shewed cause. The objection to which the sessions yielded was well founded. The order appealed against was made under the 8 & 9 Vict. c. 126, s. 62, which provides, among other things, that the guardians or overseers of the union, parish, or place affected by the order, "may appeal against the same in like manner as if the same were a warrant of removal," and that the appellants and respondents "shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all

respects as in the case of an appeal against a warrant of removal." Now, in that case, it has been provided by the 11 & 12 Vict. c. 31, s. 9, that no appeal shall be allowed against any order of removal, if notice of appeal be not given within twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless a copy of the depositions are applied for, in which case a further period of fourteen days is given. It cannot be contended that this enactment does not apply to orders under the Act first referred to, for the maintenance of lunatic paupers, for the contrary has been decided in *The Queen* v. *The Justices of Glamorganshire* (*a*). The only difference between that case and the present is, that a notice of chargeability and of the grounds of removal were sent in the one and not in the other. But such notice was not necessary here, because this is an order of maintenance and not of removal. A similar objection was raised in *The Queen* v. *The Inhabitants of Minster* (*b*); but the Court, in delivering judgment, observed, "This objection fails, because the regulations relating to orders of removal are not applied to orders for maintenance of lunatics, although the regulations relating to appeals against the former orders are applied to appeals against the latter orders. Now, the requirement of a notice of chargeability is a regulation relating to removals, and not to appeals against removals."

If it be asked from what time the twenty one days are to be computed, the answer is, from the commencement of the grievance, that is, from the service of the order. [He referred to *The Queen* v. *The Recorder of Shrewsbury* (*c*) with respect to what is the grievance, under the 13 & 14 Car. 2, c. 12, and the 4 & 5 W. 4, c. 76, s. 79, in cases of orders of removal.] [*Coleridge*, J.—The intention of the Pauper Lunatic Act is, unquestionably, to transfer to lunatic orders

(*a*) 13 Q. B. 561.
(*b*) 14 Q. B. 349, 361.
(*c*) 1 E. & B. 711, overruling the decision reported, *ante*, p. 105.

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the practice of appeals against orders of removal. But as there is no notice of chargeability from which to compute the time for giving notice of appeal, how is that part of the ordinary practice to be transferred? In proposing to count the twenty-one days from the service of the notice of the order, are you not creating a new practice rather than complying with the existing one? The 11 & 12 Vict. c. 31 says that the notice is to be given within twenty-one days from a particular fact. We have no such fact in this case; and how are we authorized to substitute another fact in its place, and say that the time shall run from it?] The case of *The Queen* v. *The Justices of Glamorganshire* (*a*) has settled that notice of appeal must be given within the time prescribed by the 11 & 12 Vict. c. 31, s. 9,—that is, within twenty-one days computed from some point of time. *The Queen* v. *The Inhabitants of Minster* establishes that notice of chargeability is not necessary; therefore the twenty-one days cannot be counted from the service of it. As twenty-one days, then, must run, and as they cannot be computed from the service of the notice of chargeability, some analogous time must be found; and that, it is submitted, must be the time when the parties are first aggrieved, which is, upon the service of the order.

Manson, contrà. If the 11 & 12 Vict. c. 31, s. 9, applies to appeals against such an order as the present, its provisions must be complied with. But it makes the time commence to run from the service of certain documents. These, therefore, should have been served. There is no reason why they should not; at all events, until they are served the time cannot be computed. Service of the order does not comply with the letter of the act, nor does it with the spirit; for the object which it had in view was that the necessary information with respect to the settlement should be conveyed, which the order does not do.

Cur. adv. vult.

(*a*) 13 Q. B. 561.

COLERIDGE, J.—This was a rule for a mandamus to the justices of the county of Derby, to enter continuances and hear an appeal against an order of justices, dated 25th November, 1852, adjudicating the settlement of Mary Milsom, a lunatic, to be in the township of Mangotsfield, and ordering payment to one of the overseers of Glossop, and the treasurer of the Glossop Union, of certain sums of money, for the conveyance, maintenance, medicine, clothing, and care of the said Mary Milsom. The rule was argued before me in the Bail Court, in the last term. It appeared that the appeal had been dismissed at the sessions, on the ground that notice of appeal had not been given in due time, which was considered to be within twenty-one days from the service of the order.

In the case of an order of removal, the 9th section of the 11 & 12 Vict. c. 31 forbids the allowance of any appeal, unless notice be given within twenty-one days after notice of chargeability, and statement of the grounds of removal shall have been sent by the removing parish to the parish to which the order is directed, unless in the case specially provided for in the section.

In shewing cause against the rule, the case of *The Queen* v. *The Justices of Glamorganshire*, was relied on, and that case would be precisely on all fours with the present, but that there the appellant parish had been served with notice of chargeability, and particulars of settlement. In the present case that has not been done; and it was urged that the case of *The Queen* v. *The Inhabitants of Minster* (*a*) decides that it is not necessary, on the ground that the service of a notice of chargeability is a regulation relating to removal, and not to appeals against removal. As, therefore, the removing parish had not, either by neglect or because it was not required by law, sent any notice of chargeability, it was contended that they could not insist on a notice of appeal, which, if required at all, was required to be served within twenty-one days from the service of the notice of chargeability.

(*a*) 14 Q. B. 349, 361.

The judgment in *The Queen* v. *The Justices of Glamorganshire*, however, proceeds on the supposition that, although the 11 & 12 Vict. c. 31 applies to appeals against orders for the maintenance of pauper lunatics, yet, having been framed originally for the procedure on orders of removal, a strict and literal application may not always be capable of being made, and, therefore, that an adaptation of the procedure, by way of analogy, must be sufficient, and is required. When, therefore, a notice of chargeability or statement of the grounds on which the adjudication of the settlement or the order of maintenance has been made, shall be served, the twenty-one days within which the notice of appeal shall be sent, will run from the day of that service. But when that has not been done, the service of the order itself seems an analogous step in the proceeding from which to commence the twenty-one days. In this way it seems to me that the intentions of the Legislature in passing the 8 & 9 Vict. c. 126, s. 62, will be best effected, that "persons appealing, or intending to appeal," "shall" "be subject to the same obligations, in all respects, as in the case of an appeal against a warrant of removal." These words are very general and comprehensive; and it would be strange if they did not apply to an obligation so important as that of giving notice of appeal. It seems to me that they might have been followed with sufficient closeness, and so as to effectuate the object of the statute, by a notice given within twenty-one days from the service of the order. I cannot, therefore, say that the magistrates at sessions decided improperly, and, consequently, the rule for a mandamus will be discharged.

Rule discharged.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Michaelmas Term.

IN THE SEVENTEENTH YEAR OF THE REIGN OF VICTORIA.

The Judge who usually sat in the Bail Court in this Term, was CROMPTON, J.

Bail Court.
1853.

November 11.

WADSWORTH *v.* BENTLEY.

Coram *Crompton*, J.

To an action for words imputing to the plaintiff, in the way of his trade, that he was dishonest and a cheat, the defendant pleaded judgment recovered in a former action. Upon the trial of the issue upon nul tiel record, the record produced shewed that the former action had been brought for calling the plaintiff a thief simply, and not in the way of his trade. *Held*, no bar.

SLANDER. The inducement of the declaration stated that the plaintiff, before and at the time of the committing of the grievances thereinafter mentioned, was a trader, and traded by buying carpet materials and selling groceries. The first count then alleged that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, as such trader, in the way of his trade, the following words:—"Thou" (meaning the plaintiff in the way of his trade) "cheated me" (meaning that the plaintiff, in the way of his trade, had cheated the defendant). The words and innendoes in the second count were: "I will not apologise

to that thief" (meaning the plaintiff) "no, never;" (meaning that the plaintiff, as such trader, in the way of his trade, was dishonest). Those in the third count were: "Thou" (meaning the plaintiff) "is a damned, blasted thief; thou" (meaning the plaintiff) "robbed me of 100*l.*, thou damned rascal;" (meaning that the plaintiff, as such trader, in the way of his trade, had contracted a debt with the defendant, and had, as such trader, in the way of his trade, in some rascally manner, avoided paying part of it). The words in the fourth count were: "Thou" (meaning the plaintiff) "is a robber and a rascal;" and the inuendo was the same as that of the preceding count. Fifth count: "That spectacled fellow is a damned thief;" (meaning that the plaintiff, as such trader, had done something dishonest, and was not trustworthy). Sixth count: "Don't thou" (meaning the plaintiff) "give an opinion; when I see thee" (meaning the plaintiff) "it makes my blood boil; thou" (meaning the plaintiff) "hast robbed me; whenever I meet thee" (meaning the plaintiff) "in the street it makes my blood boil, and I am not right for several days after;" (meaning that the defendant had sustained some loss by some dishonest conduct of the plaintiff, as such trader, in the way of his trade). Seventh count: "Is that thee" (meaning the plaintiff), "with thy damned spectacles? He" (meaning the plaintiff) "has robbed me of 100*l.*; I can prove it. Thou" (meaning the plaintiff) "is a robber and a rascal; I can prove it;" (meaning that the plaintiff was a dishonest person). The declaration concluded with an averment of special damage.

Plea, inter alia, judgment recovered in a former action for the same grievances. Replication, nui tiel record. Rejoinder, that there is a record, &c.

Upon production of the record, it appeared that the declaration in the former action was for the following words, spoken by the defendant of the plaintiff: "That thief" (meaning the plaintiff) "is a damned villain, a

scoundrel, a rascal, and I can prove him" (meaning the plaintiff) "to be a damned thief any moment."

Cowling, for the defendant, having moved for judgment.

Hall, contrà. The record produced does not prove the plea. The declaration in the first action is for words imputing a felony, and neither states that they were spoken of the plaintiff in the way of his trade, nor lays any special damage. [He was then stopped by the Court.]

Cowling. The record produced establishes the plea, and entitles the defendant to judgment. It is not necessary that the record should, on the face of it, shew that the grievances are necessarily identical. It is enough if the Court can see that they are the same. [*Crompton*, J.—Am I to decide that a charge of cheating, in the way of the plaintiff's trade, means the same thing as "that thief is a damned villain," &c.?] Although the words be not the same in both actions, yet the judgment in the first may be a bar to the second, as where, for instance, the words in each are different parts of the one volley of abuse, which is the cause of action. In *Gardner* v. *Helvis* (*a*), the declaration alleged that the defendant had said of the plaintiff that he was a lampooner, inuendo a libeller, and upon a plea of judgment recovered in a former action for the same cause, it appeared that there the declaration had been for the same word, but contained no inuendo. The Court, however, gave judgment for the defendant. [*Crompton*, J.—There the word sued for was the same in both cases, and the Court very properly held that a plaintiff could not entitle himself to a new action by giving an interpretation to the word. The meaning of "lampooner" was well understood in the reign of James II.] The other side must go the length of contending that wherever the words are laid differently in the second action, the judgment in the first is no bar. [*Crompton*, J.—I think the defendant must produce a record from

(*a*) 3 Lev. 248.

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which it will appear that the cause of action in both actions may have been the same. I do not see from this record that the causes of action can have been the same]. The maxim that nemo bis vexari debet pro eadem causâ applies. [*Crompton*, J.—Certainly; but here the charges seem to me as different as those of murder and stealing a 5*l.* note]. They may be but two parts of one slander. Suppose a libellous picture were exhibited of any one for an hour, could he bring an action for an exhibition of half an hour, and then a second for the other half hour? A recovery in trespass is a bar to trover, and also in replevin; *Com. Dig.* "*Action*," K. 3. [*Crompton*, J.—Both forms may be maintained for the same wrong.] There is no authority for saying that more than one action can be maintained for a libel, though it may consist of several pieces. Both sides are entitled to have the whole libel read at the trial, though one paragraph only be complained of. [*Crompton*, J.—That is only for the purpose of explaining the meaning of the libel, and not for inflaming the damages]. If a newspaper article libels a man as a murderer and a thief, and the first imputation only is charged in the declaration, is the plaintiff at liberty to bring a second action for the other charge? [*Crompton*, J.—The damages are, in law, given only in respect of that imputation, though the whole libel be read. If every fraction of a sentence did give rise to separate actions, the Court might interfere to stop them].

CROMPTON, J.—I do not entertain any doubt in this case. The rule is, that the record produced on the trial by record must be such as to shew on its face that the cause of action in both cases may be the same. I cannot think that a declaration for words imputing a felony simply is the same as one in which the charge is that the plaintiff has been slandered in the way of his trade, by being called a cheat. The case cited in the argument is the nearest to this; but there the second action was for the same word. The charges here are, one of felony, the other of slandering the plaintiff as a trader. Not only are the words essentially

different, but the imputations which they convey are the subjects of two wholly distinct classes of actions. The plaintiff, therefore, is entitled to judgment.

Judgment for the plaintiff.

In re W. B. DAVIES. November 11.

Coram *Crompton*, J.

The Court will not strike an attorney off the roll for acting without authority in conducting the prosecution of a prisoner for felony.

J. WILDE moved for a rule, calling upon *W. B. Davies*, an attorney of this Court, to shew cause why he should not be struck off the roll.

It appeared from the affidavits, that upon the trial, at the Middlesex Sessions, of two persons for felony, a brief for the prosecution, bearing the name of Davies, was delivered to counsel, who conducted the prosecution accordingly. The prisoners were convicted, but upon application being made to the Court for costs, inquiry was made as to whether any authority had been given to the attorney to prosecute. The prosecutor, a police inspector, and all the witnesses, police constables, denied that they had given instructions to any attorney or other person to employ counsel, or otherwise interfere in the prosecution. The counsel for the prosecution stated to the assistant Judge that the brief with Davies' name had been left at his chambers by a person of the name of Page, who, it appeared from the evidence of the inspector, had been in the habit for many years of hanging about the Court, and acting as an attorney. The deputy clerk of the peace then wrote to Davies, inquiring from whom he had received instructions to prosecute. Davies answered at first that "professional etiquette deterred him from giving the name of the party," but added, in a subsequent part of his letter, "I beg to express my sincere regret if I had been led into

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an error. It was purely unintentional on my part, for I have never considered, nor do I consider it unprofessional for an attorney to undertake a case, if he runs the risk of receiving such costs as the Court may think proper to award." The assistant Judge directed that the facts of the case should be submitted to the consideration of the Incorporated Law Society, and the present motion was made by their direction.

J. Wilde. The affidavits shew clearly that the attorney instructed counsel to prosecute, without having received any authority whatever to act in the case. The object was obviously to obtain the costs allowed upon prosecutions; and under such circumstances the Court will exercise its summary jurisdiction. [*Crompton*, J.—I do not say that it is an improper practice for an attorney to volunteer to interfere in a prosecution; but there is no precedent for an application to strike him off the roll for such conduct. Since the object for which he volunteered was to get the costs, which are in the discretion of the Court, what can be easier than for the Court to check the practice, by refusing the attorney his expenses in such cases?] That would throw on a criminal Court the burden of inquiring in every case in which counsel appeared, whether the attorney instructing him had been duly authorized to do so. Unquestionably such malpractices might be checked by this course; but that is no reason why an attorney who so conducts himself should not be called to account in this Court for his misconduct.

CROMPTON, J.—What this person has done is simply this: he has intruded himself into a prosecution. It is not high practice, certainly, for an attorney, and it ought to be discouraged; but I do not think that it is such an act as requires that he should be struck off the roll.

Rule refused.

SWINBORNE *v.* CARTER. *November* 24.

Coram *Crompton*, J.

THIS was a rule, calling upon the plaintiff to shew cause why he should not give security for costs. The affidavit upon which it was obtained stated that the plaintiff resided in Scotland, out of the jurisdiction of the Court.

The affidavit of the plaintiff's attorney, in answer, stated that "the plaintiff is possessed of large landed and other estates, situate at Pontop, Kaye Colliery, Hartlepool, and elsewhere, in the county of Durham, of considerable annual value over and above all charges affecting the same."

A plaintiff resident abroad is not subject to the ordinary rule as to giving security for costs, if he be seised or possessed of land in this country.

But, in answer to a rule calling upon him to give security for costs, he must distinctly shew that the land is not mortgaged, or otherwise unavailable for the purposes of an execution.

Hayes shewed cause. The general rule is, that a person residing out of the jurisdiction of the Courts here must give security for costs, but an exception is made in his favour when he is possessed of real property in England. In 2 *Archbold's Prac.* 1231, 8th ed., it is said, "It is no answer to the application that the plaintiff is in the possession of money, or Exchequer bills, or other floating capital, in this country, sufficient to answer for the costs; but it seems it would be so if he be in possession of chattels real, or other property, of a fixed and permanent nature, unless, indeed, he be a foreigner." *The Edinburgh and Leith Railway Company* v. *Dawson* (*a*) is there cited, where *Patteson*, J., after adverting to the fact that since 1 & 2 Vict. c. 110, Exchequer bills may be taken in execution, says, "And therefore the company have property within the jurisdiction of the Court, which may, perhaps, become available to the defendant. But I think that this property is of that description which is not available on this rule. When it is said that if the plaintiffs have property in this country, it

(*a*) 7 Dowl. 573, 576, 577.

must be meant that it should be sure property, (I do not say exactly that it must be lands or houses, or of what nature it must consist), but still it must be of a more permanent nature than mere money or Exchequer bills, which may be passed from one person to another." So in *The Kilkenny and Great Southern and Western Railway Company* v. *Feilden* (*a*), *Parke*, B., observes, "The only exceptions to this rule are, where one of several plaintiffs resides in this country, or where there is real estate here."

Wise, in support of the rule. In order to come within the exception, the plaintiff must shew that the defendant is certain to obtain his costs if he succeeds. Security for costs is in general required where the plaintiff has placed himself in a position to escape from the personal risk of a ca. sa., to which he would otherwise be subject; but where he has real estate, which may be taken in execution, he is not required to give security. It does not, however, appear in this case that the plaintiff has any such property. It is consistent with the plaintiff's case, that all the estates mentioned are mortgaged, and consequently could not be extended under an elegit. [*Earl Ferrars* v. *Robins* (*b*), *The Limerick and Waterford Railway* v. *Fraser* (*c*), were cited].

CROMPTON, J.—I quite agree with Mr. *Hayes* that the possession of real property within the jurisdiction of the Courts here is a sufficient answer to an application of this kind; but the affidavit must go further than the present one, and must shew that the property is available for the purposes of an execution. My Brothers *Patteson* and *Parke*, in the passages of their judgments in the cases cited, put the exception to the general rule upon the true ground. In order to bring the plaintiff within the exception, it must be shewn that the property possessed by him in this country

(*a*) 6 Exch. 81, 86. (*b*) 2 Dowl. 636.
(*c*) 4 Bing. 394.

is available property. As the present affidavit is sworn, I am not satisfied that the plaintiff has any available in England. The affidavit merely says, "that the plaintiff is possessed of large landed estates of considerable value," "over and above all charges affecting the same;" but they may, nevertheless, be wholly unavailable upon an execution. I think, therefore, the rule must be made absolute.

Rule absolute.

Ex parte The Surveyor of the Highways of the Township of SKELTON. *November* 25.

Coram *Crompton*, J.

SCOTLAND moved for a rule, calling upon certain justices of Staffordshire, and also upon the North Staffordshire Railway Company, to shew cause why a distress warrant should not issue, to levy upon the goods of the company 30*l.* 0*s.* 11*d.*, being the amount of a highway rate.

The allowance of a highway rate was, by inadvertence, entered and signed by the justices at the foot of a page in the middle of the rate. It stated the allowance of "the foregoing rate."

Held, that the rate was invalid quoad, at all events, the assessments below the allowance.

It appeared that the company had been rated in the above sum; but the signatures of the justices to the allowance of the rate, were not affixed to the end of the rate, but were, by mistake, written at the foot of a page in the rate-book, in about the middle of the rate, and before that part which contained the above mentioned assessment upon the company. The allowance of the rate was in the following words: "We, the undersigned," &c., "do hereby consent to, and allow the foregoing rate and assessment. As witness," &c. The company having refused to pay, they

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Ex parte Surveyor of SKELTON.

were summoned before the justices against whom the rule was now asked, to shew cause why a distress warrant should not issue to levy the amount upon their goods. At the hearing of the summons, the rate-book was produced, when the above facts appeared; and upon the objection being taken that there was no allowance of the assessment upon the company, the justices declined to issue their warrant.

Scotland. The rate was not void in consequence of the mistake in the place of the allowance in the rate-book. It was voidable only upon appeal; and as there had been no appeal, the rate ought to be enforced. [*Crompton*, J.—From the words "foregoing rate," in the allowance, it is to be inferred that the justices thought they had got to the end of the rate when they affixed their signatures]. The allowance of the rate is a mere ministerial act; the justices have no discretion to withhold their allowance. There was no provision under the Highway Act (5 & 6 Wm. 4, c. 50) that the allowance should be placed in any particular part of the rate, and sect. 118 provides that no objection shall be made for want of form. In *Regina* v. *Fordham* (*a*), the 6 & 7 Wm. 4, c. 96, s. 2, declaring that a rate "shall be of no force and validity," was held not to apply to the omission of the particulars prescribed in the earlier part of the same section. [*Crompton*, J.—There it was held that the words declaring the rate should be of no force applied to the signature only. Here the rate is good as far as it goes up to the allowance, but is it signed or allowed within the words of the statute? His Lordship referred to *Sibbald* v. *Roderick* (*b*)]. Here there is both signature and allowance. They are, it is true, placed by mistake in the wrong place, but that is an irregularity only, and ought not to invalidate the rate.

CROMPTON, J.—I think that the justices were right. It

(*a*) 11 A. & E. 73. (*b*) Ibid. 38.

is clear that they could have no authority to issue a distress if the rate was not allowed, and clearly no part of the rate after their signatures was allowed. It is admitted that they had no jurisdiction to enforce any assessment which had not been allowed. If the signature, although in a wrong place, had affected to allow the whole rate, it might have been sufficient; but here it can only be intended as sanctioning what has gone before, for the words of the allowance are expressly, "We, the undersigned, &c., consent to and allow the foregoing rate and assessment." It is impossible to hold that the allowance of foregoing matter can be an allowance of that which follows. The rule, therefore, must be refused.

Rule refused.

CASES

ARGUED AND DETERMINED

IN

The Bail Court.

Hilary Term.

IN THE SEVENTEENTH YEAR OF THE REIGN OF VICTORIA.

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The Judge who usually sat in the Bail Court in this Term, was ERLE, J.

November 25.
January 18.

REGINA *v.* HARDEN.

Coram *Erle*, J.

A plaint in a County Court having been brought against H., as the owner of a ditch, to recover money expended in enforcing an order of justices under the Nuisances Removal Act: the defendant applied to a Judge at Chambers for a prohibition, on the ground that he was not the owner of the ditch, and consequently a question of title was involved. The Judge in some measure sanctioned the objection, but the application stood over, and was not afterwards proceeded with. The plaint was tried, and the jury found for the plaintiff, but the County Court Judge, yielding to the same objection, refused to make an order for payment of the amount of the verdict. The plaintiff afterwards obtained a rule for a mandamus, directing him to make such order, and the rule was made absolute upon reference to the 3rd section of the Nuisances Removal Act, which appeared not to have been previously adverted to.

Held, that under these circumstances H., who had unsuccessfully opposed the rule for a mandamus ought not to pay the costs of that application.

THIS was a rule calling upon Charles Aiken Holland to shew cause why he should not pay to the guardians of the Northwich Union the costs of a rule for a mandamus, and also the costs of the writ, and of that application (*a*).

The following facts appeared upon the affidavits:—

Early in 1852 an order of justices was obtained by the

(*a*) See *Reg.* v. *Harden*, 2 E. & B. 188.

guardians of the Northwich Union, under the Nuisances Removal Act (11 & 12 Vict. c. 123, s. 1), ordering Mr. Holland, or in the event of his default, the guardians, to cleanse a ditch, of which he was said to be the owner. As he did not comply, the guardians obeyed the order, and expended in the matter 18*l.* 15*s.* 6*d.* They then summoned him before two justices, under sect. 3, to recover those expenses, but he denied that he was the owner of the ditch, and they thereupon refused to entertain the application against him, upon the ground the title to the premises was in question. The guardians subsequently wrote to Mr. Holland, informing him that they had been advised by counsel that the costs in question might be recovered in the County Court; and they subsequently brought an action against him there. Before the hearing, however, Mr. Holland, on the 5th day of October, 1852, obtained a summons calling on the Judge of the County Court, and one Christopher Cheshire, who was both clerk of that Court and clerk of the guardians, to shew cause why a prohibition should not issue. On the hearing of the summons, on the 8th day of October, *Crompton*, J. expressed an opinion that the point was important, and suggested that the case should stand over for the opinion of the Court. An order, however, was made by consent, that the cause should stand over till the 17th of November, the day for which the hearing was fixed, in order to give Mr. Holland the opportunity of applying to the Court. Mr. Holland, however, declined to make any such application; but when the cause came on to be tried in the County Court, he disclaimed all title to the ditch, and objected that the Judge had no jurisdiction to try the cause, as his disclaimer raised a question of title. The Judge, acting under the erroneous belief that *Crompton*, J. had refused a prohibition, and had done so after argument, declined to stop the hearing, but suggested that the amount sued for should be raised to 20*l.*, in order that the question might be carried by appeal to one of the

superior Courts. This was refused, and in the result the jury found a verdict for the plaintiffs for 18*l.* 15*s.* 6*d.*; but the Judge made no order against the defendant for the payment of that sum. A few days afterwards the Judge proposed to the parties to take a case to one of the superior Courts, and prepared a case for that purpose; but the guardians refused to consent to this course, and applied to the Judge to make an order against Holland for the payment of the amount in question. This he refused to do, and the rule for a mandamus was in consequence obtained against him. It was afterwards made absolute, and thereupon the present rule was obtained.

Cowling and *Holland* shewed cause. It is admitted that costs are in general awarded to the party succeeding on the application for a mandamus, unless there are strong grounds for exemption; but in this case strong grounds for exemption exist. A person who unsuccessfully defends a judgment in his favour is not made to pay costs, and the opinion and conduct of the County Court Judge was in the nature of a judicial decision in favour of Mr. Holland: *Tapping on Mandamus*, 417. Where, on execution of an inquiry under a railway act, the sheriff stopped the case on a preliminary objection taken by the railway company, and a rule for a mandamus on the sheriff to proceed with the inquiry was afterwards opposed by the railway company, but the mandamus issued and was obeyed; it was held that the company could not be subjected to costs for supporting a judicial decision in their favour; *The Queen* v. *The Sheriff of Middlesex* (*a*). The objection raised by Mr. Holland went to the tribunal only, and did not prevent the case from being tried upon the merits by a Court of competent jurisdiction. *The Queen* v. *The Justices of Cumberland* (*b*) is the origin of the new class of cases. There a mandamus issued to the justices to enter continuances and hear an appeal which

(*a*) 5 Q. B. 365.
(*b*) 5 D. & L. 430.

they had refused to hear, upon the objection taken by the respondents that the notice of appeal was not properly signed, as the appellants were an incorporated railway company, and their attorneys, who had signed the notice, had not been appointed under the corporate seal; and the costs of the company in procuring the mandamus were directed to be paid by the respondents. In *Regina* v. *Justices of Cheshire* (*a*), where the costs of the mandamus were granted against the party succeeding below, the objection to which the sessions had improperly yielded was equally frivolous. [They referred also to *The Queen* v. *The Justices of Surrey* (*b*); *The Queen* v. *The Justices of Surrey* (*c*); *The Queen* v. *The Justices of London* (*d*); *The King* v. *The Lord of the Manor of Oundle* (*e*), and *The King* v. *The Commissioners of the Thames and Isis Navigation* (*f*)]. In the present case, however, the circumstances were peculiar; the objection was not frivolous, and would not have had the effect of excluding the case from trial upon the merits, before a Court of competent jurisdiction. The defendant's title to the locus in quo was in question. The point decided in *The Queen* v. *Harden* (*g*) was new, which distinguishes the present case from *The Queen* v. *The Mayor of Newbury* (*h*), which may be relied upon on the other side.

Pashley, in support of the rule. The cases reported as to costs of mandamus since the passing of stat. 1 Wm. 4, c. 21, and especially *The Queen* v. *The Mayor of Newbury* (*h*), place the practice upon a clear and intelligible footing. Unless strong grounds of exemption be shewn, costs will be granted to the party ultimately succeeding. In that case Lord *Denman* says, "It is so nearly a matter of course to grant costs, under the statute, to the party ultimately succeeding, that we cannot, without very strong

(*a*) 5 D. & L. 426.
(*b*) 14 Q. B. 684.
(*c*) 9 Q. B. 37.
(*d*) Ibid. 41.
(*e*) 1 A. & E. 299, note (*c*).
(*f*) 5 A. & E. 804.
(*g*) 2 E. & B. 188.
(*h*) 1 Q. B. 751.

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grounds, depart from the general rule" (*a*). In *The Queen* v. *The Justices of Surrey* (*b*), *Patteson*, J., says, "I think the general rule which the Court has laid down as to the costs of mandamus is right; though I will not say that it is to be enforced in all cases. Here the contest was entirely between the parties to the appeal; the justices did not interfere. The case of the unsuccessful parish has been likened to that of a party upholding a verdict obtained on the erroneous ruling of a Judge: but it must be recollected that parties sustaining the decision of a Court, and failing, are not always exempted from costs." As *Williams*, J. observes in that case, those who create the expense ought to pay for it. There are no strong grounds of exemption in this case, nor any special circumstances to take it out of the general rule. Mr. Holland had full notice that the Judge of the County Court had jurisdiction in the case.

Cur. adv. vult.

ERLE, J., on a subsequent day, delivered the following judgment:—

This was a rule calling on Mr. Holland to pay the costs of a rule for a mandamus to the County Court Judge of Cheshire to hear a suit, which was made absolute, but Mr. Holland had shewn cause against it.

The late cases have generally given the costs of obtaining the writ to the successful party; and though it is a matter for the discretion of the Court, it is said that they ought to be given unless there are strong grounds to the contrary; *The Queen* v. *The Mayor of Newbury* (*c*). Taking that to be the rule, I have come to the conclusion that Mr. Holland has shewn sufficiently strong grounds for holding him to be exempt. The objection that title to land was in question was true, and would have ousted the jurisdiction if it had not been for a recent enactment. It was an objection to the tribunal, which did not decide the contest, and did not prevent its decision upon the merits. It had the sanction of

(*a*) 1 Q. B. 765. (*b*) 9 Q. B. 37, 40.
(*c*) 1 Q. B. 751.

the Judge of the County Court, and it had in a degree the sanction of Mr. Justice *Crompton*, at Chambers, who provided for an application to the full Court for a prohibition, as appears by the statement in *The Queen* v. *Harden* (*a*).

The objection had again the sanction of the County Court Judge upon the second hearing, when he prepared a case for the application so provided for, and himself stayed the proceedings, in order that it might be made. In all these applications, as the law was then understood, the defendant was entitled to succeed, and the application for the mandamus was supported only by a reference to a subsequent statute, which had not been before adverted to, and then first received a judicial construction.

Rule discharged.

(*a*) 2 E. & B. 188.

Ex parte W. COURTENAY BRUTTON. *January* 27.

Coram *Crompton*, J.

Semble, that where a period of time elapses between an agreement to assign articles of clerkship and the actual execution of the deed of assignment, that period cannot be computed as part of the five years within the 6 & 7 Vict. c. 73, s. 3, if it be passed by the clerk in the service of the attorney to whom the assignment was to be made.

COLERIDGE applied that Mr. Brutton, an articled clerk, should be at liberty to give the requisite notices to the examiners, and to be examined next Term.

It appeared from the affidavits that the applicant was by articles of agreement, dated the 25th of January, 1849, articled to Mr. Ford, an attorney and solicitor at Exeter, and that he duly served under the articles from the day of their date up to the 26th day of June, 1851. On the last mentioned day, Mr. Ford, at the request of the applicant, and of the applicant's father, who was also an attorney at Exeter, agreed to assign the articles to the latter, and to execute a formal deed of assignment when any such instrument should be presented to him for execution.

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On the same day the applicant, with his father's and Mr. Ford's consent, left the service of the latter for the purpose of completing his service with his father, and served him accordingly from that day until the 25th of January, 1854, when the period of five years expired. No formal assignment of the articles, however, was executed until the 10th of January, 1852.

Coleridge. The question is, whether the applicant's service to his father, between the 26th June, 1851, when he left Mr. Ford, and the 10th January, 1852, when the assignment was executed, is to be regarded as service under the articles, within the meaning of the 6 & 7 Vict. c. 73, s. 3 (*a*). Although the assignment was in fact unexecuted during that time, there was an agreement that it should be made. In *Ex parte Brown* (*b*), where a clerk was discharged from his articles on the ground of his master's insanity, a portion of the term, which was, after that event, served under other attorneys, who carried on the master's business, was not allowed to be reckoned; but in that case there was no adoption of such service by the master: Here the service was by the consent of all the parties. [*Crompton*, J. The language of the statute is very express. I do not see how service under an agreement for an assignment can be reckoned as service under the assignment]. At all events, the Court will allow the plaintiff to be examined, postponing for the present the question of his admissibility. Where it was agreed that an articled clerk should be assigned, but the assignment was not executed for a fortnight,

(*a*) Which enacts, "That, except as hereinafter mentioned, no person shall, from and after the passing of this act, be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall, after the expiration of the said term of five years, have been examined and sworn in the manner hereinafter directed," &c.

(*b*) 9 Dowl. 526.

the Court allowed him to be examined de bene esse. *Ex parte Masterman* (*a*). [*Crompton*, J. I cannot conceive that even after the examination there would be any power under this act to admit the applicant]. Still, it may be important to him that he should be now examined. Under special circumstances an examination has been allowed before the expiration of the five years' service; *Ex parte Fulcher* (*b*).

CROMPTON, J.—I am strongly of opinion that the applicant will not be entitled to be admitted upon this examination, but you may take a rule for his examination.

Rule accordingly.

(*a*) 7 Dowl. 156. (*b*) 8 Dowl. 614.

HOLLAND *v.* FOX.

January 17.

Coram *Erle, J.*

WEBSTER moved for a rule ordering the defendant to render to the plaintiff, within seven days, an account of all the umbrellas and parasols manufactured by him, his workmen and agents, in imitation of the plaintiff's invention, shewing the quantity sold by the defendant, his workmen, agents and others by his authority or cognizance; to pay to the plaintiff all moneys received by reason of such manufacture and sale, and to pay, on the articles remaining in stock and unsold, sums equal to the sums received for the goods sold; and to allow the plaintiff to inspect the defendant's books.

After verdict for plaintiff in an action for the infringement of a patent, a rule for an account and payment under 15 & 16 Vict. c. 83, s. 42, is absolute in the first instance.

Under the same circumstances, however, an order for inspection of the defendant's books will not be made in the absence of special grounds.

The rule was moved for under the Patent Law Amendment Act (15 & 16 Vict. c. 83, s. 42 (*a*)). It appeared that

(*a*) Sect. 42 enacts that "In any action in any of her Majesty's superior Courts of Record at Westminster and in Dublin

this action was brought for the infringement of a patent obtained by the plaintiff in May, 1840, for some improvement in the manufacture of umbrellas and parasols, and that a verdict was found in his favour in February, 1853.

Webster. The rule should be absolute in the first instance. The defendant can then come to the Court to set aside the order; but if a rule nisi only be granted, the plaintiff will have no opportunity to answer the affidavit of the defendant. This application is analogous to that which is made under similar circumstances in the Court of Chancery; and in that Court the order is absolute in the first instance. An injunction is not asked for. [*Erle*, J.—Why do you ask to inspect the defendant's books?] In order to ascertain whether the account to be rendered is true. In similar cases the Court of Chancery grants an inspection as part of the order.

ERLE, J.—Except where there are very special reasons for it, it is unjust to order that the books of one tradesman should be laid open to the inspection of another and a hostile trader; and there do not appear to be any special reasons for it here. The rule therefore, so far, must be refused: but you may take a rule absolute as to the rest of the application. I think, however, that it should direct him to obey within ten days. This will give him time to make an application to the Court to set it aside.

Rule absolute.

for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting then for a Judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection or account, and to give such direction respecting such action, injunction, inspection and account, and the proceedings therein respectively, as to such Court or Judge may seem fit."

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